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Sam 143

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, PETITIONER,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR CERTIORARI FILED APRIL 22, 1936.

CERTIORARI GRANTED JUNE 1, 1936.

Supreme Court of the United States

OCTOBER TERM, 1935

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[fol. 1]

IN SUPREME COURT OF MONTANA

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA and James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana, Defendants

COMPLAINT—Filed Nov. 8, 1935

Plaintiff complaining of defendants for cause of action alleges:

I

That at all of the times hereinafter mentioned the plaintiff has been and now is a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and qualified to do and doing business in the State of Montana.

II

That at all of the times hereinafter mentioned the deants James H. Stewart, John J. Greene, and Sam D. Goza have been and now are the duly appointed, qualified and acting members of the State Board of Equalization of the State of Montana.

III

That on and prior to the 10th day of July 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians of the Blackfeet Indian Reservation in Glacier County, Montana, was the owner of all of the oil, gas and other minerals in and under and that might be produced from the following described lands situated on the Blackfeet Indian Reservation in Glacier County, Montana, to-wit:

Lots Five (5), Six (6), and Seven (7) of Section Ten (10), Township Thirty-four (34) North of Range Six (6) West;

Lot Eight (8), South half of the southwest quarter (S½SW¼) of Section Ten (10), Township Thirty-four (34) North, Range Six (6) West;

[fol. 2] Lot Five (5), Northeast quarter of the northwest quarter (NE¼NW¼) of Section Thirty-four (34), Township Thirty-four (34) North, Range (6) West;

Lots Six (6) and Seven (7), Southeast quarter of the Northwest quarter (SE¼NW¼), Northeast quarter of the southwest quarter (NE¼SW¼) of Section Thirty-four (34), Township Thirty-five (35) North, Range Six (6) West;

Lot Eight (8), Southeast quarter of the southwest quarter (SE¼SW¼) of Section Thirty-four (34), Township Thirty-five (35) North, Range Six (6) West;

Lots Five (5) and Six (6) Section Three (3), Township Thirty-four (34) North, Range Six (6) West, M. P. M.

That on the 10th day of July, 1934, acting in accordance with a resolution of the Blackfeet Tribal Council dated June 4th, 1934, and in accordance with the provisions of law and the regulations of the Department of the Interior of the United States, and for a good and valuable consideration, Forrest R. Stone, Superintendent of the Blackfeet Indian Reservation, as lessor, made, executed and delivered to Consolidated Gas Company, a corporation, of Shelby, Montana, as lessee, a certain oil and gas mining lease in writing covering and including the hereinabove described lands, by the terms of which said lease there was demised, granted, leased and let unto the said lessee for a period of five (5) years from the date of the approval of said lease, and as long thereafter as oil or gas is found in paying quantities, all of the oil and gas deposits in or under the said described lands, a copy of which said oil and gas mining lease, marked Exhibit "A" is attached hereto and by such reference made a part hereof. That thereafter and on the 5th day of October, 1934, the said oil and gas mining lease was duly approved by the First Assistant Secretary of the Interior of the United States, as required by law and the regulations of the Department of the Interior.

IV

That thereafter and for a good and valuable consideration the said Consolidated Gas Company, the lessee named

in said lease, by an instrument in writing duly sold, assigned, transferred and set over unto the plaintiff herein the said oil and gas mining lease and all right, title and interest therein and thereto, together with the privileges and benefits thereunder, a copy of which said assignment is hereto annexed, marked Exhibit "B", and by such reference made a part of this complaint; that said assign-[fol. 3] ment was thereafter, to-wit: on the 15th day of August, 1935, duly approved by the Assistant Secretary of the Interior of the United States, as required by law and the regulations of the Department of the Interior of the United States of America.

V

That pursuant to the terms and provisions of the oil and gas mining lease hereinabove referred to, a copy of which is hereto annexed, marked Exhibit "A", the plaintiff entered upon the hereinabove described lands and proceeded to develop the same for oil and gas purposes and for the production of crude oil, and during the years 1934 and 1935 drilled to completion ten (10) oil and gas wells thereon, all of which wells were productive of and still produce crude oil in paying quantities.

VI

That in the acceptance of said oil and gas mining lease and in the development and operation of the oil and gas wells drilled on said described lands, pursuant to the terms and conditions and provisions of said lease, the plaintiff was and now is acting as and has been and is an instrumentality and an instrument and agent of the United States of America, and as such is not taxable by the State of Montana, and its license or permit to develop and operate said land under said oil and gas lease for the production of oil and gas cannot be taxed by the State of Montana, and that the said State of Montana and its instrumentalities and agents, including the defendants, are wholly without power to tax this plaintiff on its said business of developing said leased lands for production of oil and gas therefrom, either as to the gross production of crude oil from said lands, or the net proceeds derived from the development and operation of said lands for oil and gas or its income from said leased lands by way of corporation license taxes, or taxes on royalty interest on such production, and any

attempted assessments, levies or collections of such taxes on such proceeds or income or royalty are wholly invalid, illegal and unauthorized.

VII

That under and pursuant to the provisions of Sections 2088 to 2096, inclusive, Revised Codes of Montana 1921, as amended, it is the duty of the defendants to compute and assess the net proceeds of all mines and mining claims [fol. 4] in the State of Montana, including the proceeds of all oil wells for the purpose of taxation; that in the computing and assessing of said net proceeds the interest of this plaintiff as lessee is assessed and the royalty interest of the Blackfeet Tribe of Indians is assessed and the taxes on said royalty interest, if assessed and collected are required by law to be paid by this plaintiff.

VIII

That under and pursuant to the provisions of Sections 2397 to 2405, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to compute, assess and collect from every person engaged in or carrying on the business of producing within the State of Montana, petroleum or other mineral or crude oil, or engaged in or carrying on the business of owning, controlling, managing, leasing or operation within this State any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, an annual license tax for engaging in and carrying on such business in an amount equal to two percentum of the total gross value of all petroleum and other mineral or crude oil produced by such person within the State of Montana.

IX

That under and pursuant to the provisions of Sections 2088 to 2096, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to prepare and submit to the Clerk and Recorder of each County in which mines and mining claims, including oil wells are located, royalty lists or schedules setting forth the names of the royalty owners and the amount of royalty oil which each of them are entitled to and thereupon the County Clerk and Recorder is required to prepare from such schedule a

tax-roll which shall be by him furnished by the County Treasurer; and the County Clerk is required to enter such assessments in the Personal Property Assessment Book under the name of the operator of such mine or oil well, and the operator of such mine or oil well is liable for the payment of such taxes and the County Treasurer is required to collect the same from such operator.

X

[fol. 5] That under and pursuant to the provisions of Sections 2296 to 2304, inclusive, Revised Codes of Montana, 1921, as amended, the defendants are required to compute, assess and collect against this plaintiff a license fee of two percentum of its total net income received during the preceding year from all sources from within the State of Montana, including its net income derived from the exploring, developing and production of oil from lands upon which it owns oil and gas leases, including the aforesaid described leased lands.

XI

That the defendants, acting for the State of Montana, have attempted and are still attempting and threatening to compute, assess, levy and collect the taxes mentioned and set forth in paragraphs VII, VIII and IX herein, that each and all of said taxes so described are based in whole upon the oil and gas produced by this plaintiff as an instrumentality and agent of the United States of America from the aforesaid described leased lands and unless restrained by an order of this Court will continue to and attempt to compute, assess, levy and collect said taxes on said crude oil produced from said leased lands.

XII

That the assessment, levy and collection of such taxes upon such crude oil produced will constitute and cause an irreparable injury and damage to the plaintiff, and will result in a multiplicity of judicial proceedings, in that if the said taxes are computed, levied and assessed it will be necessary for this plaintiff to pay the said taxes under protest and within the time prescribed by law and to commence actions for the recovery of such taxes and each of said payments in the District Court of the county in which

said lands are located, and plaintiff therefore alleges that a restraint of the computing, levying, assessment and collection of said taxes is necessary to prevent a multiplicity of judicial proceedings.

XIII

That the defendants in this action are agents or instrumentalities of the State of Montana; that the public is interested in the outcome of this action; and the rights of the [fol. 6] public are involved in this action.

Wherefore, Plaintiff prays for judgment:

(1) That the defendants be restrained by an injunction of this court from proceeding with the computing, assessment, levying and collection of any of the taxes mentioned and set forth in this Complaint, insofar as the same are based upon crude oil produced or to be produced by this plaintiff from the leased lands described herein; and from taking any action toward such computing, levying, assessment or collection, including the transmittal of assessment reports to the officials of Glacier County, Montana.

(2) For such and other and further relief as to the Court may seem equitable.

E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff.

[fol. 7] *Duly sworn to by E. K. Cheadle, Jr. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 8] EXHIBIT "A" TO COMPLAINT

O. & G. No. 107. Cont. 15–ind–6191.

Article No. 1

Oil and Gas Mining Lease

Tribal Indian Land

This Lease made and entered into, in triplicate on this 10th day of July A. D., 1934 by and between Supt. For-

rest R. Stone, acting for and in behalf of the Blackfeet Tribe of Indians, in accordance with the resolution dated June 4th, 1934, of the Blackfeet Tribal Council, party of the first part, designated as lessor, and Consolidated Gas Company of Shelby, Montana, party of the second part, designated as lessee, under and in pursuance of Section 3 of the Act approved February 28, 1891 (26 Stat. L., 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress),

Witnesseth:

1. The lessor, in consideration of one dollar, the receipt whereof is acknowledged, and of the royalties, covenants, stipulations and conditions herein contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities, all the oil and gas deposits in or under the lands described as follows, to-wit:

Lots 5, 6, and 7 section ten, township thirty four north, range six west, M.M.

Lots 8, S/2 SW/4, section ten, township thirty-four north, range six West, M.M.

Lots 5, NE/4 NW/4, section thirty four, township thirty four north range six west, M.M.

Lots 6 & 7, SE/4, NE/4, SW/4, section thirty four, township thirty five range six West, M.M. totalling 687.26 acres, more or less.

[fol. 9] 2. The lessee hereby agrees to pay or cause to be paid to the officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the lessor, as royalty 12½% of the gross proceeds of all crude oil extracted from the saie lands unless the lessor with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, such payment to be made at the time of sale or removal of the oil.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding thirty days.

In time of war or other public emergency any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the date of sale all or any part of the oil produced under this lease.

The royalty on gas, whether it shall be gas from which the casing-head gasoline has been extracted or otherwise, shall be 12½% of the value thereof in the field where produced when the average daily production for the calendar month from the land leased is less than 3,000,000 cubic feet, and 16 2/3 per cent of the value thereof when the average daily production for the calendar month is 3,000,000 cubic feet or more: Provided, That where well- produce both oil and gas or oil and gas and water to such an extent that the gas is unfit for ordinary domestic purposes, but is used temporarily in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall pay royalty at the rate of 12½ per cent of the gross proceeds of the sale of gas from such wells. Failure on the part of the lessee to use a gas-producing well which cannot profitably be utilized at the rate herein named shall not work a forfeiture of this lease so far as it relates to mining oil, but if the lessee desires to retain gas-producing privileges he shall pay a rental of $100 per annum in advance, calculated from the date of the discovery of gas on each [fol. 10] gas-producing well, the gas from which is not marketed nor utilized other than for operations under this lease.

On casing-head gas used or sold for the manufacture of casing-head gasoline, the rate of royalty shall be 12½ per cent of the value of the casing-head gas, which value shall be determined and computed on the basis and in the manner provided in the regulations governing the utilization of casing-head gas produced from oil wells on restricted Indian lands. In cases where gas produced and sold has a value for drip gasoline, casing-head gasoline content, and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on all such values. The lessor shall have the right to the use of gas delivered at the well or at the nearest trunk line for any desired school or other building belonging to the tribe, but the lessee shall not be required to pay royalty on gas so used. Payments of annual gas royalties shall

be made within 25 days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove any casings in producing wells, or, without the written consent of the lessor, remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, excepting tools, derricks, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee and may be removed at any time prior [fol. 11] to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; shall not use such premises for any other purposes than those authorized in the lease, and before abandoning any well shall securely plug same so as effectually to shut off all water from the oil or gas bearing strata. Failure to so plug a well as to effectually shut off the water from the oil or gas strata shall be a violation of one of the material and substantial terms and conditions of this lease. The lessee agrees that if a non-producing oil and gas well develops usable water it may be turned over to the reservation without plugging and on such terms as may be agreed upon by the contracting parties, it being, however, definitely understood that the lessor shall in no case be required to pay more than the actual market value of whatever casing is left in the well in order to secure the same for the reservation.

6. The lessee shall keep an accurate account of all oil mining operations showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed;

and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and also upon all the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may, with consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder; Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

[fol. 12] 8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties.

9. The lessee hereby agrees that he will not assign or sublet any part of the lands herein leased without the written consent of the Secretary of the Interior being first obtained. The assignment of this lease or any interest herein without such written consent shall constitute a violation of one of the material and substantial terms and conditions of this lease and be cause for cancellation thereof.

10. In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days' notice to the lessee specifying the terms and conditions violated, to cancel this lease.

11. The lessee agrees that he will keep all highways on the reservation used by him in as good state of repair as he finds the same.

12. This lease is made and accepted subject to existing law and any laws hereafter enacted by Congress as to the said lands, also the regulations relative to such leases heretofore or hereafter prescribed by the Secretary of the In-

terior, and in no event shall the United States or the Secretary of the Interior be liable for damages or otherwise under the provisions hereof, and before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations. The obligations and agreements hereinbefore expressed shall extend to and be binding upon the successors in the interest of the parties hereto.

[fol. 13] In Witness Whereof, the said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Forrest R. Stone. (Seal.) ——— ———. (Seal.)

Witnesses: Two Witnesses to Lessor: ——— ———. ——— ———.

Consolidated Gas Co., (Seal.) By James W. Johnson, President. (Seal.)

Two Witnesses to Lessee: ——— ———. Attest: P. R. MacHale, Secretary. (Seal.)

Acknowledgment of Individual

STATE OF MONTANA,
County of Toole, ss:

Before me, a notary public in and for said county and State, on this 23rd day of July, 1934, personally appeared James S. Johnson and P. R. MacHale known to me to be the identical persons who executed the within and foregoing lease, as President and Secretary of Consolidated Gas Company respectively and acknowledge- to me that such corporation executed the same as its free and voluntary act and deed for the uses and purposes therein set forth.

E. K. Cheadle, Jr., Notary Public. My commission expires January 14, 1935. (Seal.)

[fol. 14] Amendments to Form 5–157

Approved:

(3) Until a producing well is completed on said premises, the lessee shall pay, or cause to be paid, to the Superintendent of the Blackfeet Agency, for the use and benefit of the lessor, as advance rentals one dollar per acre per annum

from the date of approval of this lease. It is understood and agreed that such sum of money so paid shall be a credit on stipulated royalties for the year for which the payment of advance rentals is made, and the lessee hereby agrees that said advance rentals when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation hereof; nor shall the lessee be relieved from the obligation to pay said advance rental annually, when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

Proposed:

(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days after date of approval hereof by the Secretary of the Interior, and to drill at least ten (10) wells on the premises within one year from date of such approval; and thereafter to diligently drill such additional wells as may be necessary and proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom in accordance with the most approved methods of drilling development in the field where these lands are located. It is further understood and agreed that the completion of a well is to be considered a minimum depth of one hundred (100) feet into the Madison limestone, unless production in paying qualities is found at a lesser depth. If the lessee shall fail to drill any or all of the wells as herein provided, [fol. 15] such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease; but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation; Provided that if the lessee desires to continue possession of said lease he must, within thirty days of the completion of one well, commence the drilling of a second well, or such well as the case may be and continue drilling same diligently until completed; Provided further, however, That the Secretary of the Interior may, in his discretion, upon application of the lessee, extend the time within which any well shall be commenced, upon the payment of annual rental of one dollar per acre, for each whole year the beginning of such well is delayed. For the guidance of the Secretary of the Interior, the Blackfeet

Tribal Business Council will be consulted as to its opinion in this matter. It is further understood and agreed that if the lessee shall fail or or refuse to drill as provided herein, or fail to obtain an extension of time within which to drill, he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded.

Approved:

(4a) The lessee or assignee, in consideration of the rights herein granted, agrees to abide by the Code of Fair Competition for the Petroleum Industry as approved by the President of the United States on August 19, 1933, and any modification thereof made heretofore or hereafter, so long as such code shall remain in effect, and to abide by the provisions of any Act of Congress heretofore or hereafter enacted, or any code or regulatory.

[fol. 16] Acknowledgment of Corporation

STATE OF ——,
County of ——, ss:

On this — day of ——, A. D., 19—, before me a —— within and for the state and county aforesaid, personally appeared —— and —— to me personally known, who being by me duly sworn, did each day that —— is the president and —— is the secretary of ——, a corporation, and that the seal affixed to the aforegoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said —— and —— duly acknowledged that they had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth.

Witness my hand and official seal this — day of —— 19—.

——.

My commission expires —— —, ——.

Department of the Interior

United States Indian Service

Blackfeet Agency, Browning, Montana

September 26, 1934.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be ——. See my report of even date.

Forrest R. Stone, Superintendent.

[fol. 17] Office of Indian Affairs

Washington, D. C., Oct. 2, 1934.

Respectfully submitted to the Secretary of the Interior with the recommendation that it be approved.

William Zimmerman, Jr., Assistant Commissioner.

(Stamp.)

Washington, D. C., Oct. 5, 1934.

The within lease is approved.

T. A. Walters, First Assistant Secretary of the Interior.

(Stamp.)

[fol. 18] EXHIBIT "B" TO COMPLAINT

5-154e

(Must be Executed in Quadruplicate)

Assignment of Oil and Gas Mining Lease

Whereas the Secretary of the Interior has heretofore approved oil and gas mining lease, dated July 10th, 1934, entered into by and between Consolidated Gas Company, lessee, and Supt. Forrest R. -tone, acting for Blackfeet Tribe of Indians, lessor, covering the following-described land in the Blackfeet Reservation, State of Montana

Lots 5, 6, & 7, Sec. 10, Twp. 34N, Rge. 6 W, M.M.
Lot 8, S½SW¼, Sec. 10, Twp. 34N, Rge. 6W, M.M.

Lot 5, NE¼NW¼, Sec. 34, Twp. 35N, Rge. 6W, M.M.
Lots 6 & 7, SE¼NW¼, NE¼SW¼, Sec. 34-35N-6W, M.M.
Lot 8, SE¼SW¼, Sec. 34, Twp. 35N, Rge. 6W, M.M.
Lots 5 & 6, Sec. 3, Twp. 34N, Rge. 6W, M.M.

Now, therefore, for and in consideration of One Dollar ($1.00) dollars, the receipt of which is hereby acknowledged, the said Consolidated Gas Company, the lessee in the above-described lease, hereby bargains, sells, transfers, assigns, and conveys all its right, title, and interest of the lessee in and to said lease, subject to the approval of the Secretary of the Interior, to The British American Oil Producing Company.

In witness whereof the said lessee has hereunto caused its corporate name to be subscribed and seal affixed by its duly authorized officers this 23rd day of March, 1935.

Consolidated Gas Company, by James W. Johnson, President.

Attest: P. R. MacHale, Secretary. (Corporate Seal.)

[fol. 19] Acknowledgment of Corporation

STATE OF MONTANA,
County of Toole, ss:

On this 23rd day of March, A. D. 1935, before me, a Notary Public within and for the State and county aforesaid, personally appeared James W. Johnson and P. R. MacHale to me personally known, who, being by me duly sworn, did each say that James W. Johnson is the president and P. R. MacHale is the secretary of Consolidated Gas Company, a corporation, and that the seal affixed to the foregoing and annexed instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors; and said James W. Johnson and P. R. MacHale duly acknowledged that they each had in their said official capacities executed the foregoing instrument as the act and deed of the said company for the consideration and purposes therein mentioned and set forth; and I do hereby so certify.

Witness my hand and seal on this 23rd day of March 1935.

M. L. Gilroy, Notary Public for the State of Montana, Residing at Shelby, Montana. My commission expires March 20, 1932. (Notarial Seal.)

Acceptance by Assignee

The assignee in the above and foregoing assignment, made subject to the approval of the Secretary of the Interior hereby accepts such assignment and agrees to fulfill all the obligations, conditions, and stipulations in said-described indenture of lease, when assigned and the rules and regulations of the Secretary of the Interior, so far as applicable thereto, and to furnish proper bond guaranteeing a faithful compliance with the said lease and this agree-
[fol. 20] ment.

In witness whereof the said assignee has hereunto set its hand and seal this twelfth day of April, 1935.

The British American Oil Producing Company, by W. K. Whiteford, Vice-President.

Attest: R. M. Pitcher, Secretary.

Consent of Surety

The Central Surety and Insurance Corporation, of Kansas City, Missouri surety for Consolidated Gas Company on the bond accompanying the lease above described, hereby consents to the assignment and transfer of said lease as above made and agrees that bond shall remain in force and effect covering obligations of assignee.

Dated at Tulsa, Oklahoma, this 15th day of April, 1935.

Central Surety and Insurance Corporation, by G. B. Gilliland, Attorney in Fact.

Department of the Interior, Washington, D. C., August 15, 1935.

Approved: Oscar L. Chapmen, Assistant Secretary of the Interior.

(Stamp.)

[fol. 21] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER TO SHOW CAUSE—Filed Nov. 8, 1935

The above named plaintiff, having filed in the office of the Clerk of the above entitled Court, its complaint praying for an order of this Court that the above named defendants be restrained by injunction of this Court from proceeding with the computing assessment levying and collecting of any of the taxes mentioned and set forth in said complaint.

And it appearing that said complaint was filed herein with the permission and consent of the Court.

It is hereby ordered that the above named defendants appear before the above Court at the Court Room thereof at Helena, Montana, on the 9th day of December, 1935, at 10 o'clock A. M. and show cause if any there by why the injunction prayed for in said complaint should not be issued.

Dated this 8th day of November, 1935.

A. T. Porter, Clerk.

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF MONTANA

[Title omitted]

COMPLAINT IN INTERVENTION—Filed Dec. 10, 1935

Comes now The Blackfeet Indian Tribe, through its Tribal Business Council, in such matter duly authorized, and, leave of this Honorable Court first had and attained, for its Complaint in Intervention respectfully shows the Court:

I

That Complainant in Intervention is an Indian Tribe whose members, duly enrolled in accordance with the laws of the United States reside within the confines of the Blackfeet Indian Reservation in the State of Montana pursuant to and under the provisions of treaties between said Tribe and the United States of America. That Complainant is a body politic duly constituted by the laws of the United

States, and is governed by its Tribal Business Council under the Supervision of the Secretary of the Interior of the United States.

[fol. 23]

II

That all of the lands which are embraced within the confines of said Tribal Reservation, except lands upon which patents in fee have issued, are held and owned by the United States of America in trust either for the benefit of the Blackfeet Indian Tribe or for the benefit of individual members of such Tribe to whom "trust patents" have been issued.

III

That on or about the 17th day of October, 1955, a treaty was entered into between the United States and said Blackfeet Tribe, therein designated as the Blackfeet Nation, whereunder said Tribe or Nation was given exclusive jurisdiction over the territory extending from the Continental Divide east to the point where the Milk River empties into the Missouri River.

IV

That thereafter and in consideration of the payment of monies and the making of further promises by the United States the territory of such Reservation was reduced by agreement between the United States and said Tribe, and that pursuant to said agreements, and in consideration of the relinquishment of a large area of land by said Tribe it was understood by said Tribe and the members thereof that the lands embraced within said Reservation should be forever free from taxes levied by any local or state authority. That said agreement and understanding was in full force and effect at the time of the admission of the State of Montana into the Union and at the time of the adoption of a Constitution by the State of Montana.

V

That subsequent to the year 1896 it was agreed that the lands embraced within said Reservation should so far as necessary to furnish the members of said Tribe with lands should be allotted in severalty, under the existing laws of the United States, and that the title to the lands so allotted

should be held by the United States for a period of 25 years in trust for the benefit of such individual allottees, and that [fol. 24] as long as the title to said lands should be held in trust, as aforesaid, said lands should be free from the levy of any tax by local or state authorities. That no allotments under trust patents have been made upon lands within said Reservation since the year 1919.

VI

That upon lands embraced within the confines of said Reservation and held in trust, as aforesaid, by the United States for the benefit of said Tribe or individual members thereof, oil and gas leases have been given under the authority of the United States and with the consent of said Tribe and said individual members thereof. That said leases are upon lands with respect to which no taxes may be assessed or levied by the State of Montana.

VII

That upon a portion of said lands, under lease as aforesaid, oil wells have been drilled which said wells, for a period of more than one year have been producing oil in commercial quantities.

VIII

That by said oil and gas leases aforesaid it is provided that said Tribe or said individual allottee as the case may be shall be entitled to receive from the lessees named therein a 12½ per cent royalty payable in money from all oil produced and saved from said lands, and at all times since the production of oil from said wells said royalties have been and now are being paid to the United States for the benefit of said Tribe or said individual allottees as the case may be.

IX

That despite the fact that said oil is being and has been produced from tax exempt lands, as aforesaid, and despite the fact that the royalties derived from the production of said lands are held and owned by the United States in trust, as aforesaid, the State Board of Equalization and the members thereof have threatened and do now threaten to, and will unless enjoined by order of this Honorable Court, pro-

ceed to levy the net proceeds tax provided for under the provisions of section 2088 to 2096 R. C. M. 1921 inclusive, as amended as a license tax upon the business of producing [fol. 25] oil from said leases aforesaid.

X

That by reason of the fact that said lands and leases, and the oil produced therefrom, are exempt from taxation, as aforesaid, said lands, and the leases thereon, have for a long period of time, had a value in excess of leases upon lands outside of said Reservation upon which said taxes have been and now are levied. That should said Board be permitted to levy said taxes upon the lands within said Reservation, aforesaid, said lands will become greatly reduced in value for leasing purposes, and said taxes will constitute a direct burden upon lands and property owned by the United States, in violation of said treaties and agreements and of the provisions of the Constitution and Statutes of the State of Montana.

XI

That by reason of the treaties, agreements and statutes of the United States, and the Enabling Act, the Constitution and the statutes of the State of Montana said lands, the oil and gas produced therefrom and the royalties derived therefrom are exempt from taxation, and that said Tribe and the individual members thereof have a vested property right in such tax exemption, and that to permit the levy of such tax upon said oil and gas so produced and upon said royalties would deprive said Tribe and said members of property without due process of law, in violation of the provisions of the Constitution of the United States and would impair the obligations of contracts, treaties and agreements between said Tribe and said individual members and the United States, and between the State of Montana, and the United States in violation of the provisions of the Constitution of the United States and the State of Montana.

Wherefore, Complainant in intervention respectfully prays:

1. That said defendants be restrained by order and decree of this Court from computing, assessing, levying or collecting any of said tax or taxes described in this complaint;

2. For such other and further relief as to the Court may [fol. 26] seem equitable, proper and just.

Hall & McCabe, Great Falls, Montana, Attorneys for Intervener.

[fol. 27] *Duly sworn to by H. C. Hall. Jurat omitted in printing.*

[File endorsement omitted.]

[fol. 28] IN SUPREME COURT OF MONTANA

[Title omitted]

DEMURRER OF DEFENDANTS TO COMPLAINT—Filed Dec. 10, 1935

Come now the defendants above named and demur to the complaint of plaintiff on file herein upon the following grounds, to-wit:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint does not state facts sufficient to entitle the plaintiff to the relief sought or any relief.

Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 29] IN SUPREME COURT OF MONTANA

[Title omitted]

DEMURRER OF DEFENDANTS TO COMPLAINT IN INTERVENTION—Filed Dec. 13, 1935

Come now the defendants above named and demur to the complaint in intervention of the Blackfeet Indian Tribe on file herein upon the following grounds, to-wit:

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That said complaint does not state facts sufficient to entitle the plaintiff to the relief sought or any relief.

Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 30] IN SUPREME COURT OF MONTANA

[Title omitted]

STIPULATION RE AMENDMENT OF COMPLAINT—Filed Dec. 10, 1936

It is hereby stipulated by and between counsel for the respective parties to the above-entitled action:

I. That the Complaint herein may be amended by inserting after the word "the" (the last word in line one of Paragraph III) the following:

"United States of America, for the benefit of."

II. That the copy of Patent and certificate attached thereto, which are attached to this stipulation as Exhibit "A", may be considered by this Court for every purpose in the determination of this action; and that all of the lands embraced in the oil and gas lease described in the Complaint herein were granted to various Indians in the Blackfeet Indian Reservation by Patents in form identical with that contained in said Exhibit "A", which said Exhibit "A" may be deemed attached to and made a part of said complaint.

E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff. Raymond T. Nagle, Jeremiah J. Lynch, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 31] EXHIBIT "A" TO STIPULATION

1037035.
25338-21. I.O.

702.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, a schedule of allotments approved by the Secretary of the Interior has been deposited in the General Land Office, whereby it appears that Susan Rider, an Indian of the Blackfeet Reservation, has been allotted the following-described land:

The southwest quarter of the northwest quarter of Section five in Township thirty north and the lot five of Section ten in Township thirty-four north all in Range six west of the Montana Meridian, Montana, containing eighty-five acres and twenty-five hundredths of an acre;

Now Know Ye, That the United States of America, in consideration of the premises, has allotted, and by these presents does allot, unto the said Indian the land above described, and hereby declares that it does and will hold the land thus allotted (subject to all statutory provisions and restrictions) for the period of twenty-five years in trust for the sole use and benefit of the said Indian and at the expiration of said period the United States will convey the same by patent to said Indian in fee, discharged of said trust and free from all charge and incumbrance whatsoever; but in the event said Indian dies before the expiration of said trust period, the Secretary of the Interior shall ascertain the legal heirs of said Indian and either issue to them in their names a patent in fee for said Land, or cause said Land to be sold for the benefit of said heirs as provided by law; and there is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States. Also reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919 (41 Stat., 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct.

In testimony whereof, I, Warren G. Harding, President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the Eleventh day of August in the year of our Lord one thousand nine hundred and Twenty-Two and of the Independence of the United States the one hundred and Forty-Seventh.

By the President: (Signed) Warren G. Harding. By (Signed) Ada Braddick, Assistant Secretary. (Signed) John O'Connell, (Acting) Recorder of the General Land Office.

Recorded: Patent Number 875783.

[fol. 32] STATE OF MONTANA,
County of Glacier, ss:

I hereby certify that the foregoing is a full, true, exact and correct copy of the original Patent covering the SW/4 NW/4, Section 5, Township 30, North, and Lot 5, Section 10, Township 34, North, all in Range 6, West of the Montana Meridian, Montana, containing eighty-five acres and twenty-five hundredths of an acre on record in the Office of the Indian Department of the Department of the Interior of the United States at Browning, Montana, and that said Patent is a part of the Original records of said office. And I further certify that all of the land described in and covered by that certain Oil and Gas Lease executed by Forrest R. Stone, Lessor to Consolidated Gas Company, dated July 10, 1935, No. 107, is allotted land in the Blackfeet Indian Reservation, allotted to various Indians by Patents in form identical with the above.

H. M. Knutson, Acting Superintendent of the Blackfeet Indian Reservation.

[fol. 33] [File endorsement omitted.]

IN SUPREME COURT OF MONTANA, DECEMBER TERM, 1935

No. 7605

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

v.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, and James H. Stewart, John J. Greene and Sam D. Goza, Members of Said Board, Defendants

Submitted December 10, 1935. Decided January 22, 1936

OPINION—Filed January 22, 1936

[fol. 34] Mr. Justice ANDERSON delivered the Opinion of the Court:

Plaintiff, the owner of a producing oil and gas lease on certain lands within the Blackfeet Indian Reservation, brought this original proceeding to secure an injunction against the State Board of Equalization and the individual members of the board in their official capacity, to enjoin them from collecting the "corporation license tax," the "operators' net proceeds tax," the "gross production tax," and the "royalty owners' net proceeds tax" arising out of the production and recovery of oil from the leased lands and premises.

In its complaint plaintiff alleges its corporate capacity and the official capacity of the defendant board. It is then alleged that prior to July 10, 1934, the Blackfeet Tribe of Indians, of the reservation bearing the same name in Glacier county, was the owner of all the oil and gas and other minerals in and under certain described lands, and that on the latter date, acting in accordance with a resolution of the Blackfeet Tribal Council dated June 10, 1934, and in accordance with the provisions of the laws of the United States and the regulations of the Department of the Interior, and for a good consideration, the superintendent of this Indian reservation as lessor made and delivered to Consolidated Gas Company, a corporation, as lessee, a certain oil and gas lease describing these lands, for a term of

five years from the date of the approval of the lease and as long thereafter as oil or gas was found in paying quantities. Thereafter, on October 5, 1934, this oil and gas lease was duly approved by the First Assistant Secretary of the Interior as required by law and the regulations of the Department of the Interior. It is then alleged that thereafter, and for a good and valuable consideration, the lessee sold, assigned and transferred to the plaintiff the lease and all [fol. 35] right, title and interest therein, which assignment was on August 5, 1935, duly approved by the Assistant Secretary of the Interior as required by the laws of the United States and the regulations of the Department of the Interior, and that pursuant to the terms and provisions of the lease plaintiff entered upon the lands, and during the years 1934 and 1935 drilled to completion ten oil and gas wells, all of which were productive of oil or gas in paying quantities.

It is further alleged that the plaintiff in the development and operation of these oil and gas wells is acting as an instrumentality and agent of the United States of America, and as such is not taxable by the State of Montana, and that the State of Montana and its officers are wholly without power to tax the plaintiff in the particulars mentioned supra.

The plaintiff alleges the nature of and the statutory authority for each of the taxes, and that the defendants are attempting and threatening to assess, levy and collect these taxes on the crude oil produced on these lands. The complaint contains other allegations necessary to invoke the original jurisdiction of this court.

The Blackfeet Tribe have by leave of this court filed a complaint in intervention, which alleges that its members are duly enrolled in accordance with the laws of the United States; that they reside within the Blackfeet Indian Reservation pursuant to and under the provisions of treaties between the tribe and the United States of America; that the complainant is a body politic duly constituted by the laws of the United States, and is governed by the tribal council under the supervision of the Secretary of the Interior, and that all of the lands embraced within the confines of the reservation, except those upon which patents in fee have been issued, are held and owned by the United States of America in trust for the benefit of the tribe. It

is then alleged that on October 17, 1935, a treaty was en-
[fol. 36] tered into between the United States and the members of this tribe whereunder the tribe or nation was given exclusive jurisdiction over certain territory; that thereafter, in consideration of payments of money, the area of this reservation was reduced pursuant to an agreement, and in consideration of the relinquishment of a large tract of land by the tribe it was "understood by said tribe and the members thereof that the lands embraced within said reservation should be forever free from taxes levied by any local or state authority," which agreement was in effect at the time of the admission of the State of Montana into the Union and the adoption of its Constitution; that subsequent to the year 1896 it was agreed that the lands embraced within the reservation should be allotted in severalty under the existing laws, the title to the lands so allotted to be held for a period of twenty-five years in trust for the benefit of the individual allottees, and that as long as the lands were so held in trust no taxes should be levied by local or state authorities; that upon lands embraced within the reservation and held in trust for the benefit of the tribe oil and gas leases have been given under the authority of the United States with the consent of the tribe, upon and under which leases wells have been drilled which produce oil and gas in commercial quantities, and that the oil and gas leases provide for the payment of a royalty of 12½ per cent, payable in money to the United States for the benefit of the tribe. It is then alleged that the oil so produced from tax-exempt lands, and the royalty derived from the production of the oil are being attempted to be subjected to the oil royalty tax pursuant to certain statutory provisions of the State of Montana, which will be hereafter noted, and that unless the taxing authorities are restrained and enjoined they will proceed to levy, collect and impose these taxes. It is further alleged that "by reason of the treaties, agreements and statutes of the United States, and the Enabling
[fol. 37] Act, the Constitution and the statutes of the State of Montana, said lands, the oil and gas produced therefrom and the royalties derived therefrom are exempt from taxation, and that said tribe and the individual members thereof have a vested property right in such tax exemption, and that to permit the levy of such tax upon said oil and gas so produced and upon said royalties, would deprive said tribe and said members of property without due process of

law, in violation of the provisions of the Constitution of the United States and would impair the obligations of contracts, treaties and agreements between said tribe and said individual members and the United States, and between the State of Montana and the United States in violation of the provisions of the Constitution of the United States and the State of Montana."

The defendants have interposed demurrers to both complaints challenging their sufficiency for substance. It was stipulated between the plaintiff and defendants that the complaint should be amended to show that all of the lands described in the oil and gas leases mentioned in the complaint were lands on which trust patents had been issued to individual Indian allottees, but all of which trust patents contained the following reservation: "Also reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919 (41 Stat. 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct."

In the brief filed by the state subsequent to oral argument on these demurrers, it is asserted that this court is without jurisdiction to entertain the complaint in intervention of the Blackfeet Tribe and they without capacity to sue. This argument presents a serious question. (United States v. Candelaria, 271 U. S. 432.) However, in view of the conclusion which we have reached—the net result being the same as if we had sustained this contention—we shall express no opinion on it, but treat the complaint in intervention as though it was one over which we had jurisdiction [fol. 38] without doubt.

The corporation license tax law provides (secs. 2296 to 2304, inclusive, as amended by Chapter 166, Laws of 1933) for a tax "of 2 per centum upon the total net income received by such corporations in the preceding fiscal year from all sources within the State of Montana." Certain corporations are without the provisions of the act, none of which are here involved. The Act contains numerous provisions with reference to the manner of computing the tax, and provides for deductions, etc., not here important. Section 2398, as amended by Chapter 67 of the Laws of 1923, provides in part as follows: "Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the business of owning, controlling, managing,

leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in or carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year." We will refer to this hereafter in the opinion as the gross production tax.

Section 2089, Revised Codes 1921, as amended by Chapter 188 of the Laws of 1935, provides: "Every person, partnership, corporation, or association engaged in mining * * * from or upon any mine whatsoever containing * * * petroleum, natural gas, or other valuable mineral or mineral deposits, must on or before the 31st day of March in each year make out a statement of the gross yield of the above-named metals or minerals from each mine owned or worked by such corporation." The statement is to be made by the proper officer to the defendant board and [fol. 39] is to contain the various matters enumerated in the section.

By the terms of section 2090, as amended by section 2 of Chapter 188 of the Laws of 1933, it is made the duty of the defendant board to compute the gross value of the product in dollars and cents so reported and to calculate and compute the net proceeds by making certain deductions from the gross product as provided in the section.

Under the terms of section 1 of Chapter 188 of the Laws of 1935, the operator is required to furnish the defendant board with the names and addresses of any and all persons owning or claiming any royalty interest in the product of the mine and the proceeds derived from its sale, and the amounts paid or yielded as royalty to each of such persons during the period covered by the statement. By section 3 of the chapter the board is directed, on receipt of the schedule setting forth the names and addresses of persons owning or claiming royalty, to assess the same at the full cash value of the money or product yielded during the preceding year, to be taxed on the same basis as the net proceeds of mines as provided by section 1999, Revised Codes of

1921. By section 5 of the chapter the board is directed to transmit at a specified time the valuation of the net proceeds of mines and mining claims for the purposes of taxation, to the county clerks of the respective counties, to be placed on the assessment roll of net proceeds of mines. By section 6 of the same Act the defendant board is directed to transmit the royalty lists to the county clerks of the respective counties who must prepare a tax roll in the personal property assessment book in the name of the operator of the mine, "and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and same shall be [fol. 40] payable by, and shall be collected from, such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

The first contention of the defendants is that the Blackfeet Indian Reservation is an executive order reservation, and that Congress by the Act of March 3, 1927 (44 Stat. 1347, secs. 398a, 398b, and 398c, 25 U. S. C. A. Cum. Supp. 28), has given its consent to the imposition of these taxes. The same contention was made by the same defendants in the case of Santa Rita Oil Co. v. The Board, this day decided. We there held that this contention on behalf of the state was without merit, and for the reasons there recorded and upon the authorities there cited, we again decide the contention adversely to the defendants.

Plaintiff bases its entire argument on the premise that these lands included within the leases in question are all allotted Indian Reservation lands, and argues on the authority of United States v. Rickert, 188 U. S. 432, 47 L. Ed. 532, 23 Sup. Ct. 478; Indian Territory Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779; Choctaw O. & G. R. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. 27; Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338, 42 Sup. Ct. 171; Jaybird Min. Co. v. Weir, 271 U. S. 609, 70 L. Ed.

1112, 46 Sup. Ct. 592, that the State of Montana is without authority to levy and impose these taxes. Certain other cases are cited by it which apply peculiarly to the royalty tax which we shall hereafter during the course of the opinion notice more in detail. We have given consideration to these decisions by the Supreme Court of the United States in the opinion in the Santa Rita Oil Company case, supra, and if the premise on which plaintiff founds its argument were sound, we should on the authority of that decision [fol. 41] hold that the imposing, levying and collecting of the gross production tax and the operators' net proceeds tax should be enjoined.

As to the corporation license tax, however, we now hold, for the reasons stated in the opinion just referred to—the facts applicable to that tax here being identical—that the contention is without merit.

It therefore becomes necessary for us to examine into and determine whether the premise on which plaintiff founds its argument is sound. True, trust patents have been issued to individual allottees covering all of the lands described in the lease, but in each of these patents the provision is found reserving the oil and gas for the benefit of the Blackfeet Tribe of Indians until Congress shall direct otherwise. It is noteworthy, in passing, that the lease, a copy of which is attached to the exhibit, after reciting the dates and the names of the parties. declares that it is executed under and in pursuance of section 3 of the Act approved February 28, 1891 (26 Stat. 795), as amended by the Act approved May 29, 1924 (Public No. 458, 68th Congress). The amendment there referred to is section 398 of Title 25, U. S. C. A., providing as follows: "Unallotted lands on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the preceding section may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, that the production of oil and gas and other minerals

on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior [fol. 42] is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner." The foregoing section applies only to unallotted lands.

As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe; this estate was distinct, separate and apart from the estate or interest which the United States held in trust for the benefit of the individual Indian allottees (Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14); and it follows that, as to the minerals, coal and gas, there was no allotment of these lands. This construction, as we have already pointed out, is in accord with that adopted by the original parties to this lease which was approved by the Department of the Interior, the construction of which is not to be overturned unless clearly wrong, or unless a different construction is plainly required. (Hawley v. Diller, 178 U. S. 476, 488, 44 L. Ed. 1157, 20 Sup. Ct. 986; United States v. Johnston, 124 U. S. 236, 31 L. Ed. 389, 8 Sup. Ct. 446; Miller Insurance Agency v. Porter, 93 Mont. 567, 20 Pac. (2d) 643.)

Under the provisions of section 398, Title 25, U. S. C. A., Congress has consented that the production of oil and gas on unallotted lands on Indian reservations, such as this, may be taxed by the state in which the lands are located in all respects as the same production on unrestricted lands would be taxed; and with this congressional consent there is no objection—so far as the federal Constitution and statutes are concerned—to the imposition of either the gross [fol. 43] production tax or the operator's net proceeds tax (see Jaybird Mining Co. v. Weir, supra; Mid-Northern Co. v. Walker, 265 U. S. 45, 45 Sup. Ct. 440), unless Congress has violated the treaty with the Blackfeet Tribe, or some of the agreements between the United States and this Indian tribe which were approved by Congress—to which we have

referred in our opinion this day promulgated in the case of Santa Rita Oil Co. v. The Board—and then only provided Congress by such changes has violated some constitutional right. We shall, however, consider these questions, with others in connection with our treatment of the royalty owners' tax.

Passing now to that question, it will be noted that congressional consent by section 398 of Title 25, U. S. C. A., extends not only to ordinary taxes, but to taxation of royalty interests on the lands. It is urged most strenuously by counsel on behalf of the tribe that the taxing of the royalties, if permitted to stand, is in violation of the treaties and agreements between the Indians and the United States, and also in violation of our state Constitution. Counsel rely on the cases of Choate v. Trapp, 224 U. S. 665, 56 L. Ed. 941, 32 Sup. Ct. 565; Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478, 50 Sup. Ct. 121; Morrow v. United States, 243 Fed. 854, and Carter Oil Co. v. Tax Commission, 166 Okla. 1, 25 Pac. (2d) 1092. It was held in those cases that where lands were allotted to individual Indians under an agreement that they were to remain tax-exempt for a stipulated period, on the acceptance of the allotment patent by the Individual Indian a right was vested in him which Congress was powerless to invade, in that such right was within the protection of the Fifth Amendment to the federal Constitution; but in this case the right that is invaded, if any, is a right belonging to the tribe. If it is true that the imposition of taxes on the royalties, the property of the Indian, is in violation of a treaty or agreement between the Indians and the United States confirmed by Act of Congress, that body did not exceed its power in so violating the treaty or agreement. In the case of Lone Wolf v. Hitch-
[fol. 44] cock, 187 U. S. 553, 47 L. Ed. 299, 23 Sup. Ct. 216, the court said: " 'Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in Article III (VI) of this treaty.' The appellants base

their right to relief on the proposition that by the effect of the Article just quoted the confederated tribes of Kiowas, Comanches and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be divested by Congress in any other mode than that specified in said twelfth Article and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

"The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained."

Again, in the same opinion, it was said: "Plenary authority over the trival relations of the Indians has been [fol. 45] exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (Chinese Exclusion Case, 130 U. S. 581, 600), the legislative power might pass laws in conflict with treaties made with the Indians. (Thmas v. Gay, 169 U. S. 264, 270; Ward v. Race Horse, 163 U. S. 503, 511; Spalding v. Chandler, 160 U. S. 394, 405; Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S. 114, 117; The Cherokee Tobacco, 11 Wall. 616.)

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of

the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians, it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."

This decision of the Supreme Court of the United States has not been departed from. An examination of the decisions on which counsel rely and a comparison thereof with the decision in Lone Wolf v. Hitchcock, supra, and other decisions following that one, suggest that there is a broad distinction between tribal property and private property, and between the power to abrogate a statute or treaty and the authority to destroy individual rights acquired under a law.

It is urged that the tax may not be imposed under our [fol. 46] own Constitution—section 2 of Article XII—which provides that the property of the United States shall be exempt, and under a portion of the second section of Ordinance No. 1, which is but a copy of the second provision of section 4 of our Enabling Act, wherein it is provided "that no taxes shall be imposed by the said state of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing herein contained shall preclude the said state of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation, but said last named lands shall be exempt from taxation by said state of Montana so long and to such extent as such Act of Congress may prescribe."

The lands under the second section of the Ordinance, which refers specifically to Indian lands, are only exempt from taxation until congressional consent to taxation is had. True, the title to these lands is held in trust by the United States, and to that extent the lands are its property; and if section 2 of Article XII stood alone, it would perhaps be sufficient to exempt these lands from taxation. The pro-

vision therein contained, however, is general, whereas the provision contained in the Ordinance relates specifically to Indian lands. In the construction of Constitutions, as well as statutes, broad and general provisions which tend in some measure to conflict with a specific one, are controlled by the specific provision. (Martien v. Porter, 68 Mont. 450, 219 Pac. 817; State ex rel. Corry v. Cooney, 70 Mont. 355, 225 Pac. 1007.)

In view of the congressional consent expressly authorizing all of these taxes found in section 398, Title 25, [fol. 47] U. S. C. A., we find no objection to the imposition and levy of these various taxes on lands such as are described in plaintiff's complaint. Accordingly, the demurrers to plaintiff's complaint and to the complaint in intervention of the Blackfeet Tribe are sustained, and the proceeding is dismissed.

Ralph J. Anderson, Associate Justice.

We concur: W. B. Sands, Chief Justice. John A. Matthews, S. V. Stewart, C. F. Morris, Associate Justices.

[fol. 48] IN SUPREME COURT OF MONTANA

[Title omitted]

PETITION FOR REHEARING—Filed Jan. 31, 1936

Comes now the above named plaintiff, British-American Producing Company, a corporation, and respectfully petitions this Honorable Court to grant a rehearing in connection with the above proceeding, and in this behalf respectfully shows the Court:

In the proceeding brought by the plaintiff it was urged upon behalf of the plaintiff that so far as concerns production of oil and gas from leases in which plaintiff was the lessee and covering lands situated upon the Blackfeet Indian Reservation the defendant State Board of Equalization was without power or authority under the laws of the United States and the laws and Constitution of the State of Montana to assess or levy against plaintiff either the corporation license tax, the gross production tax, or the net proceeds tax including the royalty tax. By its decision rendered on the 22nd day of January, 1936, this Court

determined that the plaintiff and royalty owners under leases held by the plaintiff were subject to the payment of the three above mentioned taxes.

In this petition for rehearing we shall not enter into any controversy with the Court with respect to the corporation license tax, but shall assume that the decision of the Court is proper under the authorities. The petition will, therefore, deal only with questions arising under the gross production tax (Section- 2397 to 2408, R.C.M. 1921, Laws of 1923, Chapter 67), and the net proceeds tax (Section- 2088 [fol. 49] to 2096, R.C.M. 1921, Laws of 1925, Chapter 191, Laws of 1927; Chapter- 139 and 140 Laws of 1933, Chapter 161 Laws of 1935, Chapter 188).

It is the theory of the plaintiff and the plaintiff earnestly contends herein, that the Supreme Court in rendering its decision with respect to the liability of plaintiff under the last above mentioned sections overlooked entirely statutes of the United States as well as provisions of the Constitution and laws of the State of Montana which are decisive of the questions presented to this Court.

The trust patents which this Court had under consideration in this proceeding contained a reservation of the oil and gas well as other minerals in the United States. This reservation was made pursuant to the provisions of 41 Statutes at large page 17. This is expressly recognized by the decision of this Court at page 4, paragraph 2. For the purpose of this proceeding it must be assumed that the provisions of this statute govern so far as concerns the leasing of the lands here under consideration for oil and gas. 41 Statutes 17 contains the following provisions:

"That any and all mineral including oil and gas are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct and patents hereafter issued shall contain a reservation accordingly; Provided that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

41 Statutes page 17 is Section 10 of Chapter 4 of the Act of June 30, 1919. As a part of the same chapter enacted at the same time appears Section 26 also cited as 41 Stat. 31 which provides for the leasing of unallotted lands "for the

purpose of mining for deposits of gold, silver, copper and other valuable metalliferous minerals." Section 26 is not an amendment of Section 10, but is a part of the same chapter and Act of Congress enacted at the same time. It will be observed therefore that the only provision for leasing for oil and gas purposes is the general provision which appears in Section 10 (41 Stat. 17) heretofore quoted.

In order to more particularly define the meaning of the word "metalliferous" Section 26 Chapter 4 (41 Stat. 31) was amended by the Act of March 3, 1921, (41 Stat. 1231), [fol. 50] as follows:

"Wherever the term 'metalliferous' is used in this section it shall be defined and construed by the Secretary of Interior to include magnesite, gypsum, limestone and asbestos."

Again on December 16th, 1926 (44 Stat. 922) Paragraphs 1 and 2 of Section 26 of the Act of June 30, 1919, were amended, but such amendment again only applies to leases for the purpose of mining for gold, silver and other metals.

See U. S. C. A., Title 25, Section 399.

Section 399, U. S. C. A. Title 25 as it originally appears in the United States Codes Annotated is not a complete section, but is merely section 26 of Chapter 4 of the Act of June 30, 1919. So far as we can determine Section 10 of Chapter 4 (41 Stat. 17) which is the section under which the oil, gas and other minerals were reserved and under which the leases here under consideration were given has been omitted from the United States Code Annotated. We have been unable to find where Section 10 of Chapter 4 of the Act of June 30, 1919, has been either amended or repealed. We must assume, therefore as did the Supreme Court in its decision in this case that Section 10 (41 Stat. 17) at the time of the execution and delivery of the leases here under consideration was in full force and effect. Under such circumstances it appears to the plaintiff that the rights of plaintiff and the owners of royalty under leases held by the plaintiff must be measured by the provisions of Section 10, Chapter 4 of the Act of June 30th, 1919 (41 Stat. 17) rather than by the provision of Section 398 U. S. C. A. Title 25, (Act of May 29, 1934, 43 Stat. 244). That this is a logical deduction from the various provisions of the United States statutes seems clear upon an analysis of the provisions of such statutes.

At the outset it is apparent that so far as concerns lands upon the Blackfeet Indian Reservation there are three classes to be dealt with: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of 41 Stat. 17. When we make this classification of the lands to be dealt with herein we find express provisions of the United States statutes with reference to oil and gas leases upon each of such classes. Thus lands allotted [fol. 51] in trust without a reservation of the mineral oil and gas in the United States are authorized to be leased under the provisions of Section 396 U. S. C. A. Title 25 (35 Stat. 783).

Santa Rita Oil & Gas Co. v. State Board of Equalization, decided January 22, 1936.

The leasing of unallotted lands on Indian Reservations is provided for in Section 398 U. S. C. A., Title 25, (43 Stat. 244), and the leasing of lands for oil and gas purposes as well as for the purpose of mining metals is provided for by the Act of June 30, 1919, Chapter 4, Section 10, 41 Stat. 17, and Section 26, 41 Stat. 31. Unless we make the above classification of Indian lands and apply the several statutes to the different classes as above set forth then the provisions of Section 399 U. S. C. A., Title 25, and the Provisions of Section 10, Chapter 4, Act of June 30, 1919, (41 Stat. 17) are meaningless.

In its decision this Court assumed that the leases in question were executed under the provisions of Section 398 which relates only to unallotted Indian lands. The Court arrives at this conclusion by reason of certain references appearing in the lease which is made a part of the plaintiff's complaint herein. This lease which appears as Exhibit "A" to plaintiff's complaint appears upon its face to be a lease of tribal Indian land. That is to say a lease under the first of the above classifications. In the first paragraph of such lease the Act of May 29, 1924, which is Section 398 U. S. C. A., Title 25, is referred to as being the law under which the lease is given. From a reading of the lease, however, it is most apparent that a form prepared for use in leasing tribal Indian lands was used in connection with the leases here under consideration and that the reference to Section 398 is in reality without meaning.

Thus it must be assumed that in a lease granted by the United States upon land as to which the surface title was in an individual allottee provision would be made with reference to protection of buildings, crops, etc., belonging to the owner of the surface. No such provision is made in the form used herein and appearing as Exhibit A. The lease appears to assume that the title to both the surface and the minerals is in the United States, and that no individual Indian has any right, title or interest in the surface of the lands described in the lease. It is apparent, therefore, that [fol. 52] Exhibit "A" is a mere form used not only for the leasing of tribal Indian lands, but for allotted lands as to which the oil, gas and other minerals have been reserved to the United States.

Thus interpreted the reference to the Act of May 29, 1924 (Section 391 U. S. C. A.) cannot be used as the construction placed upon the provisions of the United States statutes by the Secretary of the Interior. We agree with this Court that the oil and gas was reserved under the provisions of 41 Stat. 17. That by that reservation a distinct estate was carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe.

Our only controversy with the Court is with respect to its assumption that the lease was granted under the provisions of Section 398, or that the provisions of such section have any application to the lease in question or to any lease covering land allotted in trust as to which a reservation of the minerals had been made to the United States. As we have heretofore pointed out unless the lands are classified as above set forth and the proper statutes applied to each of such classes Section 10 of Chapter 4 of the Act of June 30, 1919 (41 Stat. 17) becomes meaningless. There can be no controversy herein but that Section 10 (41 Stat. 17) is still in full force and effect.

That Section which authorized and directed the reservation of the oil, gas and other minerals to the United States also specifically provides for the method under which such lands and minerals should be leased by the United States. Clearly, by the various statutes above noted a distinction has been made by the United States between unallotted tribal lands and lands which have been allotted in trust with a reservation of oil, gas and other minerals in the United

States. It is the theory and contention of the plaintiff herein that this distinction has not been noted by the Court in its decision, but that the Court has allowed itself to be mislead by the reference contained in the form of lease inadvertently used by the Department of the Interior with respect to the lands herein in question.

We are not without authority to support our contentions herein. In a letter bearing date July 15, 1935, and signed by the Commissioner of Indian Affairs, the following state-
[fol. 53] ment appears: "The leases on this reservation are authorized by provisions contained in the Act of June 30, 1919 (41 Stats. 3-17) which reserved the minerals, for the benefit of the tribe, in any lands thereafter allotted. This act contains no authorization of a state tax on the production of minerals."

"In addition to the Act of March 3, 1927 (44 Stat. 13-47) cited in your letter, there are certain other acts of Congress which authorize the levy and collection of a production tax by the states. None of these acts, however, applicable to the Blackfeet Reservation. The act of March 3, 1927, supra, relates to reservations created by Executive Order. The Blackfeet Reservation was created by treaty dated October 17, 1855 (11 Stat. 657)."

For the purpose of informing the Court as to the actual construction placed upon the leases in question by the Department of the Interior and the Commissioner of Indian Affairs we attach hereto and make a part of this petition the letter above referred to.

In its decision herein the Court assumed that the lease should be construed as coming within the provision of Section 398 by reason of the reference to that section contained in the form used by some clerk in that department. The letter from the Commissioner of Indian Affairs is attached so that the actual and true construction placed upon the leases in question by the Department of the Interior may be readily ascertained. The Court's decision is based entirely upon the proposition that the provisions of Section 398 apply. Under the above construction the Department of the Interior as well as by reason of the only logical classification of the lands here under consideration and the application of the various statutes thereto, it must be apparent that with respect to leases upon lands which have been allotted in trust with a reservation to the United

States of the oil, gas and other minerals Section 10 of Chapter 4 of the Act of June 30, 1919, is the only law applicable and that Section 398 has no bearing upon the issues presented in this proceeding. If this be true then Section 10 which is still in force and effect contains no provision either directly or by inference allowing the taxation by the State of Montana of the oil or gas produced under such leases and under the holding of this Court in the case [fol. 54] of Santa Rita Oil and Gas Company vs. State Board of Equalization, the State Board should be enjoined from levying, assessing, or collecting either the gross production tax or the net proceeds tax.

As was pointed out by this Court in its decision both in the Santa Rita Oil and Gas case and its decision in the instant case express authoritly and consent must be given by the United States before the taxes in question can be assessed, levied or collected. Section 10 gives no such consent either expressly or by implication and its follows, therefore, that the taxes may not be levied. In other words upon a proper construction of the leases in question and the statutes applicable thereto the same result should be reached as in the Santa Rita Oil and Gas Company case.

In closing this petition it should also be noticed that Section 398 U. S. C. A., Title 25, consents to the levy and collection of a tax upon the production of oil and gas. This consent has been construed by the Supreme Court of Oklahoma (41 Pac. (2nd) 918) and the Supreme Court of the United States to be limited to a tax in the nature of a property tax.

In the case of State of Oklahoma ex rel Tax Commission vs. Barnsdall Refineries, 80 Law Ed. —, Advance Opinions 6 p. 331, decided by the Supreme Court of the United States on January 6, 1936, the Supreme Court had before it the question whether an excise tax of one-eighth cent per barrel on all oil produced was within the consent of Congress under the statute allowing the collection of a tax upon the production of oil and gas produced from Indian lands. The Supreme Court in holding that such tax was an excise tax as distinguished from a property tax held that the consent of Congress must be strictly construed. Under such circumstances it would appear that the gross production tax is not even within the consent of the Congress as evidenced

by Section 398 should such section be deemed applicable herein.

Under the statutes above set forth, it is respectfully submitted that a re-hearing should be granted herein, and that the defendants should be enjoined from assessing, levying or collecting the net proceeds tax or the gross production tax against the plaintiff herein or the owners of royalty under the leases in question.

Respectfully submitted, E. K. Cheadle, Jr., G. S. Frary, Attorneys for Plaintiff. Hall & McCabe, Amicus Curiae.

[File endorsement omitted.]

[fol. 55] United States Department of the Interior,

Office of Indian Affairs,

Washington

Jul. 15, 1935.

E. K. Cheadle, Jr., Esq., Shelby, Montana.

My Dear Mr. Cheadle:

There has been referred to this office for answer your letter of June 7 directed to the Secretary of the Interior relative to the authority of the State of Montana to tax the lessee's share of proceeds received from oil and gas mining leases covering tribal lands within the Blackfeet Reservation in Montana.

Aside from provisions contained in treaties with the Indians, their tribal lands are generally regarded as exempt from taxation by the State or Federal Government, except where Congress specifically provides for taxation. See annotations to Section 348, Title 25, United States Code Annotated.

It follows that specific authorization of Congress is necessary before a State can levy and collect a production tax on minerals obtained from tribal Indians lands. The leases on this reservation are authorized by provisions contained in the Act of June 30, 1919 (41 Stats. 3-17) which reserved the minerals, for the benefit of the tribe, in any lands thereafter allotted. This act contains no authorization of a state tax on the production of minerals.

In addition to the Act of March 3, 1927 (44 Stat. 1347) cited in your letter, there are certain other acts of Congress which authorize the levy and collection of a production tax by the states. None of these acts are, however, applicable to the Blackfeet Reservation. The Act of March 3, 1927 supra, relates to reservations created by Executive Order. The Blackfeet Reservation was created by treaty dated October 17, 1855 (11 Stat. 657).

The treaty mentioned does not contain any provision specifically exempting from taxation minerals obtained from Blackfeet tribal lands. If the production tax authorized under the laws of the State of Montana were levied on the lessee's share of the proceeds received from oil and gas mining leases covering Blackfeet tribal lands, the question would then arise whether this amounts to a tax upon a Federal instrumentality and an interference by the State with the jurisdiction of the Federal Government over restricted property of the Indian. In this connection your attention is called to the case of Gillespie v. Oklahoma (257 U. S. 501) wherein the Supreme Court of the United States held the income received by a lessee from his share of the proceeds of the oil and gas under leases of restricted Indian lands was exempt from taxation by the State.

Your attention is also called to the case of Schermerhorn-Ardmore Company v. Roy Ashley, et al., Equity No. 4053, wherein the United States District Court for the Eastern District of Oklahoma held that the equipment of an oil lessee is not subject to local taxation when used in the development of restricted Indian lands on the theory that it is when so used an instrumentality of the Federal Government in pursuing its general policy in the protection and advancement of the welfare of the Indians. The decree was entered in that case February 13, 1931, enjoining the defendants from collecting taxes on property used in connection with an oil and gas mining lease covering an allotment of restricted Indians land in Oklahoma.

This office does not have available for distribution a copy of the Treaty of October 17, 1855 with the Blackfeet Indians. If you desire to examine the treaty, it is suggested that you refer to Volume 11 of the United States Statutes at large p. 657. Copy of the tribal leasing regulations is enclosed.

Sincerely yours, (Sgd.) John Collier, Commissioner.

Enclosure 647524.

[fol. 56] IN SUPREME COURT OF MONTANA

[Title omitted]

OBJECTIONS OF DEFENDANTS TO PETITION FOR REHEARING—Filed Feb. 8, 1936

Come now the defendants and object to the petition of plaintiff for a rehearing herein on the following grounds, to-wit:

I

That no question decisive of the case submitted by counsel was overlooked by the court in its decision.

II

That the decision is not in conflict with any express statute or controlling decision to which the attention of the court was not directed.

The court in its opinion in this case, as well as in its opinion in the Santa Rita Oil and Gas Company case, so fully and convincingly covered the law relating to the taxation of lessees of Indian lands and so ably and exhaustively dealt with every question which was presented that it would be nothing less supererogation on our part to attempt to justify the decision.

In the petition for a rehearing counsel for plaintiff use this language:

"At the outset it is apparent that so far as concerns lands upon the Blackfeet Indian Reservation there are [fol. 57] three classes to be dealt with: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of 41 Stat. 17. When we make this classification of the lands to be dealt with herein we find express provisions of the United States with reference to oil and gas leases upon each of such classes. Thus lands allotted in trust without a reservation of the mineral oil and gas in the United States are authorized to be leased under the provisions of Section 396 U. S. C. A. Title 25 (35 Stat. 783).

Santa Rita Oil & Gas Co. v. State Board of Equalization, decided January 22, 1936.

"The leasing of unallotted lands on Indian Reservations is provided for in Section 398 U. S. C. A., Title 25, (43 Stat. 244), and the leasing of lands for oil and gas purposes as well as for the purpose of mining metals is provided for by the Act of June 30, 1919, Chapter 4, Section 10, 41 Stat. 17, and Section 26, 41 Stat. 31. Unless we make the above classification of Indian lands and apply the several statutes to the different classes as above set forth then the provisions of Section 399 U. S. C. A. Title 25, and the provisions of Section 10, Chapter 4, Act of June 30, 1919, (41 Stat. 17) are meaningless."

They are willing to tie section 399, Title 25, U. S. C. A., to section 10 of Chapter 4, Act of June 30, 1919 (41 Stat. 17), but unwilling to tie section 398, Title 25, U. S. C. A., to section 10 of Chapter 4, Act of June 30, 1919. Oil and gas in place are minerals but they are not metalliferous minerals. (Northern Pacific Railway Co. v. Soderberg, 188 U. S. 526, 47 L. Ed. 575; Morgan v. United States, 169 Fed. 242; 40 C. J. 737.) Therefore, section 399 does not cover leases of unallotted lands for oil and gas mining purposes. The same is true of section 396, Title 25, U. S. C. A. But if, as counsel must concede, in view of the position they have taken, section 399 does cover leases of unallotted lands withdrawn from entry under mining laws for the purpose of mining for deposits of gold, silver, copper, and other valuable metalliferous minerals, including magnesite, gypsum, limestone, and asbestos, in what section must the oil and gas leases [fol. 58] considered in this case find a place? The question has been admirably answered by the court itself

"It therefore becomes necessary for us to examine into and determine whether the premise on which plaintiff founds its argument is sound. True, trust patents have been issued to individual allottees covering all of the lands described in the lease, but in each of these patents the provision is found reserving the oil and gas for the benefit of the Blackfeet Tribe of Indians until Congress shall direct otherwise. It is noteworthy, in passing, that the lease, a copy of which is attached to the exhibit, after reciting the dates and the names of the parties, declares that it is executed under and in pursuance of section 3 of the Act approved February 28, 1891 (26 Stat. 795), as amended by the Act approved May 29, 1924 (Public No. 458, 68th Congress). The amend-

ment there referred to is section 398 of Title 25, U. S. C. A., providing as follows:

'Unallotted lands on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the preceding section may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, that the production of oil and gas and other minerals on such lands may be taxed by the state in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.' The foregoing section applies only to unallotted lands.

"As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well [fol. 59] as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe; this estate was distinct, separate and apart from the estate or interest which the United States held in trust for the benefit of the individual Indian allottees (Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14); and it follows that, as to the minerals, coal, oil and gas, there was no allotment of these lands. This construction, as we have already pointed out, is in accord with that adopted by the original parties to this lease which was approved by the Department of the Interior, the construction of which is not to be overturned unless clearly wrong, or unless a different construction is plainly required."

Under the Act of June 7, 1897 (30 Stat. 62, 72), Quapaw Indians were empowered to lease their lands for farming

or grazing purposes for a term of three years or for mining purposes for a term of ten years. Under the Act of March 3, 1909 (25 U. S. C. A. 396), Indians generally, except members of the Five Civilized Tribes and Osage Indians in Oklahoma, were empowered to lease their lands for mining purposes for any term of years, with the consent of the Secretary of the Interior. In Hallam v. Commerce Mining & Royalty Co., 49 Fed. (2d) 103, cert. denied 284 U. S. 643, it was held that Quapaw Indians were entitled to the benefit of section 396 and so authorized to lease their lands for mining purposes under its provisions with the consent of the Secretary of the Interior.

The letter of the Commissioner of Indian Affairs which is attached to the petition for a rehearing gives no consideration whatever to section 398. Besides, it states nothing new so far as the taxation of Indian lands is concerned.

In the petition for a rehearing it is broadly intimated that in Barnsdall Refineries v. Oklahoma Tax Commission, 41 Pac. (2d) 918, and in State of Oklahoma v. Barnsdall Refineries, 296 U. S. —, 80 L. Ed. —, affirming the judgment in the former, both the Supreme Court of Oklahoma and the Supreme Court of the United States construed [fol. 60] section 398 as consenting to a tax in the nature of a property tax. As a matter of fact these courts did not construe section 398 at all, but did construe the Act of Congress of March 3, 1921, 5 (41 Stat. 1250), authorizing the levy and collection of a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and the gross production tax law and an excise tax law of Oklahoma. It was held that the Act of Congress was not broad enough to cover an excise tax. In its opinion the Supreme Court of the United States said: "The Supreme Court of Oklahoma emphasized the fact that the ⅛ of a cent per barrel tax, denominated by the statute an 'excise', is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied." Counsel for plaintiff in their brief and the Supreme Court in its opinion refer to the tax provided by section 2398, Revised Codes 1921, as amended by section 1 of Chapter 67, Laws of 1923, as the "gross production tax." It is similar in its scope to the gross production tax provided by section 12434, Oklahoma Statutes 1931.

We submit the petition for a rehearing should be denied. Raymond T. Nagle, Attorney General; Jeremiah J. Lynch, First Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 61] IN SUPREME COURT OF MONTANA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Feb. 8, 1936

Motion for rehearing read, considered and denied.
John A. Matthews, Presiding-Chief Justice.

Attest: A. T. Porter, Clerk.

[fol. 62] IN SUPREME COURT OF MONTANA

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, a Corporation, Plaintiff,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA and James H. Stewart, John J. Greene and Sam D. Goza, Members of the State Board of Equalization of the State of Montana, Defendants.

JUDGMENT AND DECREE—Filed Feb. 19, 1936

This matter came regularly on for hearing before the above entitled Court on the 10th day of December, 1935, upon the verified complaint of the plaintiff, The British-American Oil Producing Company, a corporation, the verified complaint in intervention of the Blackfeet Indian Tribe, and the demurrers of the defendants, the Board of Equalization of the State of Montana, James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana, Messrs. E. K. Cheadle, Jr., and G. S. Frary appearing as counsel for said

plaintiff, the Honorable Raymond T. Nagle, Attorney General, and the Honorable J. J. Lynch, Assistant Attorney General, appearing on behalf of the defendants, and H. C. Hall appearing as counsel for The Blackfeet Indian Tribe.

Whereupon oral argument was presented to the Court and briefs were filed by the respective parties and said matter was submitted to the Court.

Wherefore this Court having considered said argument and said briefs and pleadings herein and the law applicable thereto and being in all things duly advised in the premises ordered that the demurrers of said defendants to the complaint of plaintiff and the complaint in intervention of The Blackfeet Indian Tribe be sustained upon the merits and [fol. 63] said complaint and complaint in intervention be dismissed.

Wherefore by reason of the law and the premises, it is hereby ordered, adjudged and decreed that the demurrers of the defendants the Board of Equalization of the State of Montana, and James H. Stewart, John J. Greene and Sam D. Goza, members of the State Board of Equalization of the State of Montana to the complaint of plaintiff and the complaint in intervention of the Blackfeet Indian Tribe be and the same are hereby in all respects sustained and said complaint of plaintiff and the complaint in intervention of The Blackfeet Indian Tribe be and they are hereby in all respects dismissed upon the merits.

Dated this 19th day of February, 1936.

By the Court.

John A. Mathews, Acting Chief Justice.

[File endorsement omitted.]

[fols. 64 & 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1936

The petition herein for a writ of certiorari to the Supreme Court of the State of Montana is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U.
FILED
APR 22 1936
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. [redacted] 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA AND BRIEF IN SUPPORT THEREOF.

E. K. CHEADLE, JR.,
E. J. McCABE,
H. C. HALL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 953

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Respondents;

THE BLACKFEET INDIAN TRIBE,

Intervener.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

To the Honorable the Supreme Court of the United States:

The petitioner, The British-American Oil Producing Company, prays that a writ of certiorari issue to review the original judgment and decree of the Supreme Court of the State of Montana, entered in the above entitled cause, and

entered on its docket as cause No. 7505, on the 19th day of February, 1936 (R. 49), pursuant to the decision of said court entered in said cause on the 22nd day of January, 1936 (R. 25, 54 Pac. (2d) 129).

Questions Presented.

1. Whether the interest of petitioner, as lessee, and the royalty interest of the Blackfeet Indian Tribe in oil produced from lands included in the Blackfeet Indian Reservation and allotted by trust patents to Indians of such Tribe, under leases executed under the provisions of the Act of June 30, 1919 (41 Stat. 3-17), may be taxed by the State of Montana, where the oil, gas and other minerals have been reserved to the United States by such trust patent for the benefit of the Blackfeet Indian Tribe.

2. Whether the consent given by the United States to the taxation of oil produced from leases of unalloted Indian lands (Act of May 29, 1924, 43 Stat. 244), applies to oil produced from leases embracing lands allotted to individual Indians under trust patents which reserve to the United States, for the benefit of the Blackfeet Indian Tribe, the oil, gas and other minerals in and under such lands as provided in the Act of June 30, 1919 (41 Stat. 3-17).

Statutes Involved.

(a) Federal Statutes.

Act of June 30, 1919 (41 Stat. 17):

> "the Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not heretofore allotted. * * *
>
> Provided, That of the lands so allotted eighty acres of each allotment shall be designated as a homestead

by the allottee and be evidenced by a Trust Patent and shall remain inalienable and non-taxable until Congress shall otherwise direct; * * *

Provided further, That any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, That the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

Act Feb. 28, 1891, 26 Stat. 795, U. S. C. A., Sec. 397, Title 25:

"Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed * * * ten years for mining purposes * * *."

Act May 29, 1924, 43 Stat. 244, U. S. C. A., Sec. 398, Title 25:

"Unallotted lands on Indian Reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under section 397 of this Title, may be leased * * * for oil and gas mining purposes * * *

Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands * * *."

Enabling Act, Montana, February 22nd, 1889, Sec. 4, Sub. 2:

> "and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

(b) State Statutes and Constitutional Provisions.

Ordinance No. I, Sec. 2:

> "that no taxes shall be imposed by the State of Montana on lands or property therein belonging to, or which may hereafter be purchased by the United States or reserved for its use."

Constitution, Art. XII, Sec. 2:

> "The property of the United States shall be exempt from taxation."

Laws 1931, Chap. 98:

> "The property of the United States * * * (is) exempt from taxation."

Net Proceeds Tax.

Laws 1935, Chap. 188:

> "SECTION 5. On or before the fifteenth day of June in each year the State Board of Equalization shall transmit to the County Clerk of each county in which such mines and mining claims are situated, the valuation of the net proceeds of such mines and mining claims for the purpose of taxation, as the same have been determined and fixed by such State Board of Equalization, and the County Clerk shall immediately enter the same upon an assessment roll."

> "SECTION 6. At the time of transmitting net proceeds assessments the State Board of Equalization shall also transmit the royalty lists or schedules to the County Clerk of each county in which such mines and mining-

claims are located and thereupon the County Clerk shall prepare from such net proceeds and royalty assessments a tax roll which shall be by him furnished to the County Treasurer on or before the twentieth day of August following, upon which date said taxes shall be due and payable. The County Clerk shall enter such assessments in the personal property assessments book under the name of the operator of such mine or mines, and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The County Treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and the same shall be payable by, and shall be collected from, such operators in the same manner and under the same penalties as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

Laws 1925, Chap. 143:

"The taxes on such net proceeds must be levied as the levy of other taxes are provided for, and every such tax is a lien upon the mine or mining claim from which the ore or mineral products or deposits are mined or extracted, and is a prior lien upon all personal property and improvements used in the process of extracting such ore or mineral products or deposits."

Gross Proceeds Tax.

Laws 1923, Chap. 67, Sec. 1:

"Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the

business of owning, controlling, managing, leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in and carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year."

Summary Statement of the Matter Involved.

This proceeding was instituted originally in the Supreme Court of Montana by petitioner to prevent the assessment, levy and collection of certain taxes by the State of Montana based upon crude oil produced, under an oil and gas lease, from lands situated on the Blackfeet Indian Reservation, allotted under Trust Patents by the terms of which the oil, gas and other minerals in and under such lands were reserved to the United States for the benefit of the Blackfeet Indian Tribe, pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17). The oil and gas lease involved was executed by the Superintendent of the Reservation on behalf of the Tribe, and was approved by the Secretary of the Interior. The Board of Equalization of Montana seeks to assess, levy and collect certain taxes on crude oil produced by petitioner under said lease during the years 1934 and 1935, as follows:

(a) Gross Production Tax (a license or occupational tax) provided for by Secs. 2397-2405, Revised Codes of Montana, 1921, as amended.

(b) Net Proceeds Tax on lessor's and lessee's interest (a substitute for an *ad valorem* tax on the value of the

lease), provided for by Secs. 2088-2096, Revised Codes of Montana, 1921, as amended.

The complaint alleges that on July 10, 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians, was the owner of the oil, gas and other minerals in and under the land involved, and that on said date such oil and gas were leased by the Superintendent of the Blackfeet Agency to petitioner's predecessor; that during the years 1934 and 1935 petitioner produced crude oil from wells drilled on said premises; that the defendants are attempting to assess, levy and collect the above described taxes on such production; that such taxes are based upon crude oil produced by petitioner as an instrumentality and agent of the United States not taxable by the State of Montana. Defendants' demurrer admits the facts alleged. It was stipulated by counsel for both parties that all of the lands embraced in the lease were granted to individual Indians by Trust Patents under the provisions of the Act of June 30, 1919 (41 Stat. 17), in form identical with the Trust Patent attached to such stipulation (R. 23).

The *complaint in Intervention of the Blackfeet Tribe* seeks to prevent the levy, assessment, and collection of a net proceeds or royalty tax on the royalty interest of the Tribe, as depriving the Tribe of property without due process of law in violation of the provisions of the Constitution of the United States, as impairing the obligations of contracts, treaties and agreements between the Tribe and the United States, and between the United States and the State of Montana, in violation of the Constitutions of the United States and the State of Montana, and that such taxes would constitute a direct burden upon property of the United States.

The decision of the Supreme Court of Montana sustained defendants' demurrers to the complaint and complaint in

intervention and dismissed the complaint and complaint in intervention on the merits (R. 25 and 36).

Motion for rehearing was denied (R. 49).

Judgment and decree is in accordance with the decision, and sustained the defendants' demurrers and dismissed the complaint and complaint in intervention (R. 49-50).

Rulings of the Court Below.

With respect to the questions here presented, the Montana Supreme Court

(a) Concluded that the interests of the lessor and the lessee in oil produced from lands in the Blackfeet Indian Reservation and allotted by Trust Patents to individual Indians, under leases executed under the provisions of the Act of June 30, 1919 (41 Stat. 17), which Act reserved the oil, gas and other minerals therein to the United States, may be taxed by the State of Montana (R. 25 and 26).

(b) Decided that the consent given by the Congress of the United States to the State taxation of oil produced from leases of unallotted Indian lands (Act of May 29, 1924, 43 Stat. 244) applies to and includes oil produced from leases embracing lands alloted to Indians under Trust Patents which reserve to the United States, for the benefit of the Blackfeet Indian Tribe, the oil, gas and other minerals in said lands under the provisions of the Act of June 30, 1919 (41 Stat. 3-17) (R. 25 and 36).

(c) Decided that as to the oil, gas and other minerals in the lands involved, which were reserved to the United States for the benefit of the Blackfeet Tribe under the provisions of the Act of June 30, 1919 (41 Stat. 17), said lands are unallotted, and that the lease embracing the same was executed under and governed by the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.),

and therefore taxable by the State of Montana (R. 25 and 36).

(d) Decided that the lands embraced in the involved lease were allotted to individual Indians under the provisions of the Act of June 30, 1919 (41 Stat. 3-17), but that the lease was executed under the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.) (R. 25 and 36).

(e) Decree and judgment was entered sustaining defendants' demurrers to the complaint and complaint in intervention and dismissing the complaint and complaint in intervention.

Reasons for Granting the Petition.

1. Unless specific consent is given by the United States to the taxing of oil reserved to the United States for the benefit of the Blackfeet Indian Tribe, no such tax may be assessed or levied by the State of Montana.

Gillespie v. *State of Oklahoma,* 257 U. S. 501, 66 L. Ed. 338;

Howard v. *Gypsy Oil Co.,* 247 U. S. 503, 62 L. Ed. 1239.

2. No consent to such taxation by the State of Montana, specific or otherwise, is found in the Act of June 30, 1919 (41 Stat. 3-17), under the provisions of which the oil was reserved to the United States and the lease here in question authorized.

3. Section 398, Title 25, U. S. C. A. (Act of May 29, 1924, 43 Stat. 244), is not applicable to either the lands here involved or the oil produced therefrom, for the reason that such lands are neither unallotted, nor are they lands such as are described by Section 397, U. S. C. A., Title 25, to which Section 398 refers. The Supreme Court of Montana based its decision permitting the taxes here involved upon

the consent given by Section 398. If that section is not applicable the decision and decree of the Supreme Court of Montana is without basis and should be reversed.

4. The exact question here presented has never been passed upon by this Court or any Federal Court of Appeal, although the application and construction of Federal statutes is involved. However, the decision of the Supreme Court of Montana is in apparent conflict with the decisions of this Court holding that neither the lands, the lease, nor the oil produced therefrom may be taxed by the State.

Gillespie v. *State of Oklahoma*, 257 U. S. 501, 66 L. Ed. 338;

Indian Terr. Oil Co. v. *Oklahoma*, 240 U. S. 522, 60 L. Ed. 779;

Howard v. *Gypsy Oil Co.*, 247 U. S. 503, 62 L. Ed. 1239;

Large Oil Co. v. *Howard*, 248 U. S. 549, 63 L. Ed. 416.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7505, The British-American Oil Producing Company, a corporation, Plaintiff, *vs.* The Board of Equalization of the State of Montana, and James H. Stewart, John J. Greene, and Sam D. Goza, Members of the State Board of Equalization of the State of Montana, Defendants; the Blackfeet Indian Tribe, Intervener, and that said judgment of the Supreme Court of the State of Montana may be reversed by this Honorable Court, and

that your petitioner may have such other and further relief as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

THE BRITISH-AMERICAN OIL
PRODUCING COMPANY,
By E. K. CHEADLE, JR.,
E. J. McCABE,
Counsel for Petitioner.

H. C. HALL,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

The decision sought to be reviewed was rendered on January 22, 1936, and is reported in 54 Pac. (2d) 129. It has not been published in the Montana Reports (R. 25). Judgment and decree was entered on February 19, 1936 (R. 49).

II.

Jurisdiction.

The petition for rehearing was denied by the Montana Supreme Court on February 8, 1936 (R. 49), and application for writ of certiorari filed within three months thereafter (U. S. Code, Title 28, Sec. 350.)

The jurisdiction of the Supreme Court is conferred by sub-division (b) of Sec. 237 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Sec. 344).

III.

Statement of the Case.

A statement of the case appears in the petition under the heading "Summary Statement of the Matter Involved."

IV.

Specifications of Error.

1. The Supreme Court of Montana erred in sustaining respondents' demurrers to petitioners complaint and to the complaint in intervention of the Blackfeet Tribe, and dis-

missing said complaint and complaint in intervention in this, that its opinion and judgment disregarded the leasing provisions found in the Act of June 30, 1919 (41 Stat. 17), which specifically provide the manner in which the minerals in the lands which were allotted pursuant to that Act shall be leased, that is, under such terms and conditions as the Secretary of the Interior shall prescribe.

2. The Supreme Court of Montana erred in dismissing petitioners complaint and the complaint in intervention of the Blackfeet Tribe in this, that by its opinion and judgment said court determined and held that the lands embraced in the involved lease, so far as the oil, gas and other minerals therein are concerned, are unallotted lands in an Indian Reservation, and, therefore, that the lease embracing the same was executed pursuant to the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.), and accordingly that such oil and gas are taxable by the State of Montana by virtue of the Congressional consent contained in that Act.

3. The Supreme Court of Montana erred in sustaining respondents demurrers to petitioners complaint and the complaint in intervention of the Blackfeet Tribe, and dismissing said complaints, in this, that its opinion and judgment permit taxation by the State of Montana of property of the United States, and the taxing of an instrumentality of the United States.

V.

ARGUMENT.

A.

The involved lease was executed pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17), and not pursuant to the Act of May 29, 1924 (43 Stat. 344).

The lands embraced in the lease in question were allotted to individual Indians pursuant to the provisions of the Act of June 30th, 1919 (41 Stat. 3-17), which reserved the oil, gas and other minerals therein to the United States for the benefit of the Blackfeet Tribe. This Act specifically provides the manner of leasing the reserved minerals, by this proviso: "Provided, that the land containing such minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

The Montana Supreme Court held that as to the minerals, reserved to the United States under this Act, these lands are unallotted, and, therefore, the lease embracing same was executed under, pursuant to and governed by the Act of May 29, 1924 (43 Stat. 244), which makes provision for the leasing of *unallotted* lands in certain Indian Reservations, subject to mining purposes, and contains congressional consent to the imposition of taxes on the production therefrom by the States. In this the court erred, because

(a) The lands involved are not "unallotted" lands within the purview of the Act of May 29, 1924 (43 Stat. 244). This Act pertains only to lands subject to lease for mining purposes for a period of ten years under the Act of February 28, 1891 (26 Stat. 795, Sec. 397, Title 25, U. S. C. A.). This latter section applies only to the leasing for a period

not exceeding ten years, for mining purposes, of lands occupied by Indians which are not needed for farming or agricultural purposes and are not desired for individual allotments.

(b) These lands are "allotted" lands, as shown by the stipulation (R. 22). Had Congress meant, by the Act of May 29, 1924, to define "unallotted" lands as "allotted" lands, the minerals in which were reserved to the United States, it would have made clear its intention. Had this Act been intended to include lands, the surface of which was allotted, logically the lease would have provided for reimbursement to the Indian owner for damages occasioned to fences, buildings, crops, etc., by reason of operations for oil and gas development. No such provision is found in the lease.

So far as concerns leasing for oil and gas purposes, land in the Blackfeet Reservation is classified either as: (1) unallotted tribal lands; (2) lands allotted in trust; (3) lands allotted in trust as to which the oil, gas and other minerals have been reserved under the provisions of the Act of June 30, 1919 (41 Stat. 3-17). Federal statutes expressly provide for leases embracing each of such classes. Thus lands allotted in trust without a reservation of the minerals are authorized to be leased under the provisions of Sec. 396, U. S. C. A. (35 Stat. 783).

Santa Rita Oil & Gas Co. v. *State Board of Equalization*, — Mont. —, 54 Pac. (2d) 117.

Leases to embrace unallotted lands are authorized by Sec. 398, Title 25, U. S. C. A. (43 Stat. 244). The leasing of other lands for oil and gas purposes, as well as for the mining of metals, is provided for by the Act of June 30, 1919, Chap. 4, Sec. 10, 41 Stat. 17, and Sec. 26, 41 Stat. 31. Without the application of these various statutes to the differ-

ent classifications of lands, the provisions of Sec. 399, U. S. C. A., Title 25, and of Sec. 10, Chap. 4, Act of June 30, 1919 (41 Stat. 17), are meaningless.

The Montana Supreme Court assumes that this lease was executed under the provisions of Sec. 398, Title 25, U. S. C. A., and that it was so construed by the Department of the Interior, because of a reference to this section found in the printed portion of the lease. However, from an examination of the lease (R. 6) it is most apparent that a form prepared for leasing strictly tribal lands was used, perhaps inadvertently, for this particular lease, and that the reference to Sec. 398 is in reality without meaning. In this connection it is to be noted that the lease is entitled "Oil and Gas Mining Lease *Tribal Indian Land.*" The actual construction of the lease by the Interior Department is set forth in a letter from the Commissioner of Indian Affairs, dated July 15, 1935, attached to the petition for rehearing (R. 43), in which he says:

> "The leases on this (the Blackfeet) reservation are authorized by the provisions contained in the Act of June 30, 1919 (41 Stat. 3-17). * * * This Act contains no authorization of a state tax on the production of minerals."

Obviously the Montana Court erred in declaring and deciding that the parties to the lease had construed it as being governed by the provisions of Sec. 398, Title 25, U. S. C. A. Since the Act of June 30, 1919, expressly authorizes the leasing of this class of land, it would seem futile to look elsewhere for other and different authorization. The interpretation of Sec. 398, to include this land, is unnecessarily strained.

B.

The petitioner, as lessee, is an instrumentality of the United States, and as such not taxable by the State.

Petitioner, as lessee, in the oil and gas lease involved, in the development and operation of these lands for oil and gas purposes, is an instrumentality and agent of the United States in fulfilling its obligations to the Indian Tribe–by lightening the burden of the guardian and better serving the needs of the wards by the revenue obtained by such operations.

Indian Territory Oil Co. v. *Oklahoma,* 240 U. S. 522, 60 L. Ed. 779.

Neither the lease nor the production therefrom, owned by petitioner as such instrumentality, can be taxed by a State without express congressional consent.

Gillespie v. *Oklahoma,* . S. 501, 66 L. Ed. 338;
Burnet v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 76 L. Ed. 815;
Indian Territory Oil Co. v. *Oklahoma,* 240 U. S. 522, 60 L. Ed. 779;
Choctaw O. & G. Railroad Co. v. *Harrison,* 235 U. S. 292, 59 L. Ed. 234;
Howard v. *Gypsy Oil Co.,* 247 U. S. 503, 62 L. Ed. 1239;
Large Oil Co. v. *Howard,* 248 U. S. 549, 63 L. Ed. 416;
Jaybird Mining Co. v. *Weir,* 271 U. S. 609, 70 L. Ed. 1113;
Metcalf & Eddy v. *Mitchell,* 269 U. S. 514, 70 L. Ed. 384;
Group No. 1 Oil Corporation v. *Bass,* 283 U. S. 279, 75 L. Ed. 1032;
Enabling Act of the State of Montana (25 Stat. 677).

C.

The Taxes Involved.

The state taxes on oil production upheld by the Montana Supreme Court are

(a) Net proceeds tax on lessor's and lessee's interest in the oil produced, provided for by Secs. 2088-2096, Revised Codes of Montana, as amended. This includes a tax on the lessor's share of the royalty oil, and is a substitute for an *ad valorem* tax on the lease.

Byrne v. *Fulton Oil Co.*, 85 Mont. 329, 278 Pac. 514. Thus it is in effect a tax on realty, as under the Montana rule the oil and gas in place does not pass by the execution of an oil and gas lease, which is an interest in real property.

Homestake Exploration Co. v. *Schoregge*, 81 Mont. 604, 264 Pac. 388.

(b) Gross production Tax, assessed against the lessee and based on the gross proceeds, under the provisions of Secs. 2397-2405, Revised Codes of Montana, 1921, as amended.

This is a license or occupational tax.

Mid-Northern Oil Co. v. *Walker*, 65 Mont. 414, 211 Pac. 353.

D.

The oil and gas in the lands embraced in the lease are property of the United States, not taxable by the State of Montana.

The Act of June 30, 1919, and the Trust Patents issued pursuant thereto, reserve the oil and gas in this land to the United States, and hence the oil and gas belong to and are

property of the United States; as such they are not taxable by the State.

Enabling Act for the State of Montana (25 Stat. 677);
Sec. 2, Article XII, Constitution of the State of Montana;
Sec. 2, Ordinance No. 1, State Constitution of Montana;
Chapter 98, Laws of Montana 1931;
Ford v. *The City of Great Falls*, 46 Mont. 292, 127 Pac. 1004.

Respectfully submitted,

E. K. CHEADLE, JR.,
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H. C. HALL,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

BRIEF OF PETITIONER

E. K. CHEADLE, JR.,
E. J. McCABE,
H. C. HALL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 37

THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

THE BLACKFEET INDIAN TRIBE,

Intervener.

BRIEF OF PETITIONER

I.

Reference to Official Report of Case Below.

The case has not yet been officially reported. It will be found reported in 54 Pac. (2d) 129.

II.

Statement of Grounds on Which Jurisdiction Invoked.

(a) *Date of Judgment.*

The original judgment and decree of the Supreme Court of Montana was entered on the 19th day of February, 1936 (R. 49) pursuant to the decision of said court entered on the 22nd day of January, 1936 (R. 25).

(b) *Specific claims advanced and rulings made in State Supreme Court relied upon as basis for Court's jurisdiction.*

In the Supreme Court of Montana, petitioner claimed:

(1) The oil and gas in the land involved in the lease here in question was and is the property of the United States (R. 1. 37).

(2) The taxes sought to be levied are taxes upon the property of the United States and upon an instrumentality of the United States (R. 3, 5, 40).

(3) No consent has been given by the United States for the taxation of the oil and gas in or that is produced from the lands embraced in the lease here involved (R. 3, 42).

(4) The assessment, levy and collection of the taxes here involved is prohibited by the Federal Statutes, the Montana Constitution and the Montana Statutes (R. 3, 37, 42).

With reference to the claims advanced by petitioner the Supreme Court of Montana ruled:

(1) The oil and gas in the land involved in the lease was and is the property of the United States (R. 32, 35).

(2) The taxes sought to be levied are taxes upon the property of the United States and upon an instrumentality of the United States (R. p. 31, 32).

(3) By the provisions of Sec. 398, Title 25 U. S. C. A. (Act May 29, 1924) the United States consented to the levying of the taxes here involved upon the oil and gas produced from the lands embraced in the lease (R. 32, 33).

(4) The assessment, levy and collection of the taxes here involved is not prohibited by Federal Statute, the Montana Constitution or Montana Statute (R. 32, 33, 35, 36).

(c) *Statutory provisions under which jurisdiction of this Court is invoked.*

The decision of the Supreme Court of the State of Montana was rendered January 22, 1936 (R. 25) and its judgment entered February 19, 1936 (R. 49), less than three months prior to the date of the application for the writ of certiorari herein (U. S. Code, Title 28, Sec. 350).

The jurisdiction of this Court is invoked under the provisions of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 344) in that petitioner claims a right, privilege and immunity under the Constitution and Statutes of the United States.

(d) *Cases believed to sustain jurisdiction.*

Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;
Gillespie v. State of Oklahoma, 257 U. S. 501, 66 L. Ed. 338;
Longest v. Langford, 276 U. S. 69, 72 L. Ed. 471;
Marlin v. Lewallen, 276 U. S. 58, 72 L. Ed. 467;
Larkin v. Paugh, 276 U. S. 431, 72 L. Ed. 640;
Longest v. Langford, 274 U. S. 499, 71 L. Ed. 1170.

III.

Statement of the Case.

This proceeding was instituted originally in the Supreme Court of Montana by petitioner (R. 1-6) to prevent the assessment, levy and collection of certain taxes by the State of Montana based upon crude oil produced, under an oil and gas lease (R. 6), from lands situated on the Blackfeet Indian Reservation, allotted under trust patents by the terms of which the oil, gas and other minerals in and under such lands were reserved to the United States for the benefit of the Blackfeet Indian Tribe, pursuant to the provisions of the Act of June 30, 1919 (41 Stat. 17). (R. 23). The oil and gas lease involved was executed by the Superintendent of the Reservation on behalf of the Tribe (R. 11), and was approved by the Secretary of the Interior (R. 14). The Board of Equalization of Montana seeks to assess, levy and collect certain taxes on crude oil produced by petitioner under said lease during the years 1934 and 1935, as follows:

(a) Gross Production Tax (a license or occupational tax) provided for by Secs. 2397-2405, Revised Codes of Montana, 1921, as amended (R. 4, 5).

(b) Net Proceeds Tax on lessor's and lessee's interest (a substitute for an ad valorem tax on the value of the lease), provided for by Secs. 2088-2096, Revised Codes of Montana, 1921, as amended (R. 4, 5).

The complaint alleges that on July 10, 1934, the United States of America, for the benefit of the Blackfeet Tribe of Indians, was the owner of the oil, gas and other minerals in and under the land involved, and that on said date such oil and gas were leased by the superintendent

of the Blackfeet Agency to petitioner's predecessor, (R. 1, 2); that during the years 1934 and 1935, petitioner produced crude oil from wells drilled on said premises (R. 3); that the defendants are attempting to assess, levy and collect the above described taxes on such production (R. 4, 5); that such taxes are based upon crude oil produced by petitioner as an instrumentality and agent of the United States not taxable by the State of Montana (R. 5). Defendants' demurrer admits the facts alleged (R. 21). It was stipulated by counsel for both parties that all of the lands embraced in the lease were granted to individual Indians by trust patents under the provisions of the Act of June 30, 1919 (41 Stat. 17) in form identical with the trust patent attached to such stipulation (R. 23).

The complaint in intervention of the Blackfeet Tribe (R. 17-21) seeks to prevent the levy, assessment and collection of a net proceeds or royalty tax on the royalty interest of the Tribe, as depriving the Tribe of property without due process of law in violation of the provisions of the Constitution of the United States, as impairing the obligations of contracts, treaties, and agreements between the Tribe and the United States, and between the United States and the State of Montana, in violation of the Constitution of the United States and the State of Montana, and that such taxes would constitute a direct burden upon property of the United States.

The decision of the Supreme Court of Montana sustained defendants' demurrers to the complaint and complaint in intervention and dismissed the complaint and complaint in intervention on the merits (R. 25 and 36).

Motion for rehearing was denied (R. 49).

Judgment and decree is in accordance with the decision, and sustained the defendants' demurrers and dismissed the complaint and complaint in intervention (R. 49-50).

IV.

Specifications of Error.

1. The Supreme Court of Montana erred in sustaining defendants' demurrers to petitioner's complaint and to the complaint in intervention of the Blackfeet Tribe, and dismissing said complaint and complaint in intervention in this, that its opinion and judgment disregarded the leasing provisions found in the Act of June 30, 1919 (41 Stat. 17), which specifically provide the manner in which the minerals in the lands which were allotted pursuant to that Act shall be leased, that is, under such terms and conditions as the Secretary of the Interior shall prescribe.

2. The Supreme Court of Montana erred in dismissing petitioner's complaint and the complaint in intervention of the Blackfeet Tribe in this, that by its opinion and judgment said Court determined and held that the lands embraced in the involved lease, so far as the oil, gas and other minerals therein are concerned, are unallotted lands in an Indian Reservation, and, therefore, that the lease embracing the same was executed pursuant to the provisions of the Act of May 29, 1924 (43 Stat. 244, Sec. 398, Title 25, U. S. C. A.), and accordingly that such oil and gas are taxable by the State of Montana by virtue of the Congressional consent contained in that Act.

3. The Supreme Court of Montana erred in sustaining respondents' demurrers to petitioner's complaint and the complaint in intervention of the Blackfeet Tribe, and

dismissing said complaints in this, that its opinion and judgment permit taxation by the State of Montana of property of the United States, and the taxing of an instrumentality of the United States.

V.

Summary of Petitioner's Contentions.

1. The State of Montana, acting through respondents, seeks to assess against, levy upon, and collect from petitioner two separate taxes provided for by the laws of Montana:

(a) A net proceeds, or ad valorem tax, based upon the production of oil and gas;

(b) A gross proceeds, or license tax, based upon the production of oil and gas.

2. The oil and gas lease here involved embraces lands situated within the Blackfeet Indian Reservation held under an individual trust allotment, as to which the oil and gas were reserved to the United States for the benefit of the Blackfeet Indian Tribe.

3. The oil and gas in and under the lands embraced in the lease are the property of the United States and the production thereof may not be taxed by the State of Montana without the specific consent of the United States.

4. The oil and gas in and under the lands embraced in the lease here involved was reserved to the United States for the benefit of the Blackfeet Tribe under the provisions of the Act of June 30, 1919, 41 Stat. 3-17, which section, together with the Act of September 20,

1922, c. 347, 42 Stat. 857, provides for the leasing of such lands for oil and gas production.

5. The Blackfeet Indian Reservation is a "treaty" and not an "executive order" reservation, and the consent to taxation provided for in 44 Stat. 1347, (U. S. C. A. Title 25, Sections 398 a, b, and c) does not apply to the lands here involved.

6. The land here involved is not unallotted land within the provisions of the Act of May 29, 1924, 43 Stat. 244, U. S. C. A. Title 25, Section 398, and the consent to taxation therein contained does not apply to the lands here involved.

7. Neither the Act of June 30, 1919, (41 Stat. 3-17) nor the Act of September 20, 1922, c. 347 (42 Stat. 857) (U. S. C. A. Title 25, Section 400), which provide specifically for the leasing of allotted and unallotted lands on the Blackfeet Reservation contain any consent to the levy of taxes by the State.

8. Petitioner, as lessee of the oil and gas reserved by the United States for the benefit of the Blackfeet Indian Tribe, is an instrumentality of the United States in producing such oil and gas, and, as such, is not subject to the taxes here sought to be assessed, levied and collected.

VI.

ARGUMENT.

A.

Taxes Involved.

1. Net Proceeds Tax. (Secs. 2088-2096 Revised Codes, Montana 1921, as amended by Laws 1935, Chap. 188, and Laws 1925, Chap. 143):

Laws 1935, Chap. 188:

"Sec. 5. On or before the fifteenth day of June in each year, the State Board of Equalization shall transmit to the county clerk of each county in which such mines and mining claims are situated, the valuation of the net proceeds of such mines and mining claims for the purpose of taxation, as the same have been determined and fixed by such State Board of Equalization, and the county clerk shall immediately enter the same upon an assessment roll.

"Sec. 6. At the time of transmitting net proceeds assessments the State Board of Equalization shall also transmit the royalty lists or schedules to the county clerk of each county in which such mines and mining claims are located and thereupon the county clerk shall prepare from such net proceeds and royalty assessments a tax roll which shall be by him furnished to the county treasurer on or before the twentieth day of August following, upon which date said taxes shall be due and payable. The county clerk shall enter such assessments in the personal property assessments book under the name of the operator of such mine or mines, and such assessments when entered shall have all the force and effect as if made in the names of the owners of such royalty individually as well as against the operator. The county treasurer shall proceed to give full notice thereof to such operator and to collect the same in manner provided by law. The operator or producer shall be liable for the payment of said taxes, and the same shall be payable by, and shall be collected from, such operators as provided for the collection of taxes upon net proceeds of mines; provided, however, that after payment of such tax such operator may recover or withhold from any proceeds of royalty interest, either in kind or in money, coming into his hands, the amount of any tax paid by him upon such royalty or royalty interest."

Laws 1925, Chap. 143:

> "The taxes on such net proceeds must be levied as the levy of other taxes are provided for, and every such tax is a lien upon the mine or mining claim from which the ore or mineral products or deposits are mined or extracted, and is a prior lien upon all personal property and improvements used in the process of extracting such ore or mineral products or deposits."

This tax is upon the lessee's interest and the lessor's royalty, and is a substitute for an ad valorem tax on the lease.

Byrne v. Fulton Oil Co., 85 Mont. 329, 278 Pac. 514;

Thus it is, in effect, a tax on the realty, as under the Montana rule, the oil and gas in place does not pass by the execution of an oil and gas lease.

Homestake Exploration Co. v. Schoregge, 81 Mont. 604, 264 Pac. 388;
Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;

2. Gross Proceeds Tax. (Sections 2397-2405, Revised Codes, Montana, 1921, as amended by Laws 1923, Chap. 67, Sec. 1):

> "Every person engaging in or carrying on the business of producing, within this state, petroleum, or other mineral or crude oil, or engaging in or carrying on the business or owning, controlling, managing, leasing or operating within this state any well or wells from which any merchantable or marketable petroleum or other mineral or crude oil is extracted or produced, sufficient in quantity to justify the marketing of the same, must, for the year 1923, and each year thereafter, when engaged in or carrying on any such business in this state, pay to the

state treasurer, for the exclusive use and benefit of the State of Montana, a license tax for engaging in and carrying on such business in an amount equal to two per centum of the total gross value of all petroleum and other mineral or crude oil produced by such person within this state during such year."

This is a license tax.

Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353.

B.

Ownership of the Oil and Gas.

The trust allotment covering the lands here involved contains the following provision, (R. 23):

"reserving, to the United States, in accordance with the provisions of the Act of June 30, 1919, (41 Stat. 17), all minerals, including coal, oil and gas, for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct."

The Act of June 30, 1919 (41 Stat. 17) provides:

"The Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not heretofore allotted * * *

"Provided, That of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable and nontaxable until Congress shall otherwise direct; * * *

"Provided, further, That any and all minerals, including coal, oil and gas, are hereby reserved for the benefits of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly;

> Provided, That the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

In connection with the mineral interest so reserved the Supreme Court of Montana said in its decision (R. 32):

> "As we view the situation, when the trust patents were issued containing the reservation of the oil and gas as well as other minerals, including coal, pursuant to 41 Stat. 17, a distinct estate was thereby carved out or created consisting of the reserved minerals which the United States thereafter held in trust for the benefit of the Blackfeet Tribe."

At the time of the execution of the lease, therefore, ownership of the oil and gas was in the United States for the benefit of the Blackfeet Tribe. The execution of the lease did not divest the title of the United States.

Homestake Exploration Co. v. Schoregge, 81 Mont. 604, 264 Pac. 388;

Cases based upon the Texas Rule that an oil and gas lease constitutes a transfer of the oil in place are not in point.

C.

Without the Consent of the United States Neither the Oil Nor the Production Thereof May Be Taxed.

This rule was recognized by the Supreme Court of Montana in its decision herein (R. 30, 31) and in its decision in a companion case.

Santa Rita Oil & Gas Co. v. Board, 54 Pac. (2d) 117 (not yet officially reported).

It is the rule adhered to by this Court.

Gillespie v. Oklahoma, 257 U. S. 501, 66 L. Ed. 338;
Burnet v. Coronado O. & G. Co., 285 U. S. 393, 76 L. Ed. 815;
Indian Terr. Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. Ed. 779;
Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234;
Howard v. Gypsy Oil Co., 247 U. S. 503, 62 L. Ed. 1239;
Large Oil Co. v. Howard, 248 U. S. 549, 63 L. Ed. 416;
Jaybird Mining Co. v. Weir, 271 U. S. 609, 70 L. Ed. 1112;
Metcalf & Eddy v. Mitchell, 269 U. S. 514, 70 L. Ed. 384;
Group No. 1 Oil Corp. v. Bass, 283 U. S. 279, 75 L. Ed. 1032;
United States v. Rickert, 188 U. S. 432, 47 L. Ed. 532;
Childers v. Beaver, 270 U. S. 555, 70 L. Ed. 730;
Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478.

The exemption is provided for in the Enabling Act of the State of Montana (25 Stat. 677):

> "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

It is recognized by various Constitutional provisions and Statutes of Montana:

Ordinance No. 1, Sec. 2:

> "That no taxes shall be imposed by the State of Montana on lands or property therein belonging to,

or which may hereafter be purchased by the United States or reserved for its use."

Constitution, Art. XII, Sec. 2:

"The property of the United States shall be exempt from taxation."

Laws of Montana, 1931, Chap. 98:

"The property of the United States (is) exempt from taxation."

See also:

Ford v. The City of Great Falls, 46 Mont. 292, 127 Pac. 1004;

City of Great Falls v. Jeffries, 83 Mont. 111, 270 Pac. 638;

Three Forctops v. Ross, 73 Mont. 6, 235 Pac. 334;

Barnsdall Refineries v. Commission, 171 Okla. 145, 41 Pac. (2d) 918;

Taber v. Indian Terr. Oil Co., (Okla.) 57 Pac. (2d) 1167.

The exemption has been sustained as to income taxes, *(Gillespie v. Oklahoma*, 257 U. S. 501); gross production taxes, *(Howard v. Gypsy Oil Co.*, 247 U. S. 503; *Large Oil Co. v. Howard*, 248 U. S. 549; *Choctaw O. & G. Ry. Co. v. Harrison*, 235 U. S. 292); ad valorem taxes, *(Jaybird Mining Co. v. Weir*, 271 U. S. 609); occupation or license taxes, *(Choctaw O. & G. Ry. Co. v. Harrison*, 235 U. S. 292); royalty tax, *(Carpenter v. Shaw*, 280 U. S. 363, 74 L. Ed. 478).

Neither the state legislature nor the state court, by giving a tax a particular name, or by the use of some form of words, can take away the duty of this Court to consider the real nature and effect of the tax.

Choctaw O. & G. Ry. Co. v. Harrison, 235 U. S. 292, 59 L. Ed. 234.

D.

The United States Has Not Consented to the Imposition of the Taxes Here Involved.

In what has been said before, the Supreme Court of Montana agreed with petitioner's contentions. Unless, therefore, there is statutory authority and consent for the imposition of these taxes, the decision of the State Court was erroneous.

In the State Court counsel for respondents took two positions: (1) That the Blackfoot Reservation is an "executive order" reservation and that consent to the imposition of the taxes is found in Section 398, a, b, and c, Title 25, U. S. C. A. (44 Stat. 1347); (2) That the lands were unallotted lands within the provisions of Section 398, Title 25, U. S. C. A., (43 Stat. 244), and that the consent contained in that statute applied. We shall here take up these contentions seriatim.

At the outset it must be borne in mind that the net proceeds tax here sought to be levied affects not only the lessee's interest but also the royalty interest of the Blackfeet Indians. Thus, not only is an instrumentality of the United States sought to be taxed, but the interest of the Indians is directly affected. In such case two rules of construction must be applied: (1) the statutes involved must receive a liberal construction in favor of the Indians; and, (2) the presumption is against any consent to taxation.

Carpenter v. Shaw, 280 U. S. 363, 74 L. Ed. 478;
Gleason v. Wood, 224 U. S. 679, 56 L. Ed. 947;
Choate v. Trapp, 224 U. S. 665, 56 L. Ed. 941.

1. *The Blackfeet Indian Reservation is a "treaty" and not an "executive order" reservation.*

Sections 398, a, b and c. Title 25, U. S. C. A., (44 Stat. 1347), which counsel for respondents sought to have applied in the State Court are as follows:

398 (a):

> "Unallotted lands within the limits of any reservation or withdrawal created by executive order for Indian purposes or for the use or occupancy of any Indians or tribes may be leased for oil and gas mining purposes in accordance with the provisions contained in Section 398 of this Title."

398 (b):

> "The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within executive order Indian reservations or withdrawals shall be deposited in the treasury of the United States to the credit of the Tribe of Indians for whose benefit the reservation or withdrawal was created, or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians; Provided, that such Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress."

398 (c):

> "Taxes may be levied and collected by the State or local authority, upon improvements, output of mines or oil and gas wells or other rights, property or assets of any lessee upon lands within executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and

such taxes may be levied against the share obtained for the Indians as bonuses, rentals and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the treasury; provided, that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians."

The Supreme Court of Montana, in its decision, held that the Blackfeet Reservation was a "treaty" and not an "executive order" reservation, and that the above sections had no application herein (R. 30). In reaching this conclusion, it followed its decision in the companion cause of *Santa Rita Oil & Gas Company v. Board,* 54 Pac. (2d) 117. The chronological history of the Blackfeet Reservation is substantially as follows:

On October 17th, 1855, a treaty was made and concluded within what is now the State of Montana, then in the Territory of Nebraska, between the commissioners on the part of the United States and the Blackfeet Tribe and other Tribes of Indians (11 Stat. 657). By Article IV a tract of country was described which "shall be the territory of the Blackfoot Nation, over which said Nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty." By Article VII it was agreed that the citizens of the United States might live and pass unmolested through the countries occupied and claimed by the Indian Tribe. By Article VIII consent was given to the United States to construct roads, lines of telegraph and military posts, to build houses for agencies, missions, schools, etc., and to occupy permanently as much land as might be necessary for the various purposes enumerated, including the use of wood for fuel and land for grazing; the navigation of all lakes and streams was declared to be forever free to the citizens

of the United States. This treaty was ratified by the Senate of the United States on April 15, 1856, (11 Stat. 662), and on April 25, President Franklin Pierce accepted, ratified and confirmed the treaty. On July 5, 1873, President Grant, by executive order, on the recommendation of the Department of the Interior, withheld from entry and settlement as public lands all of that portion of the State of (then Territory of) Montana lying west of the Territory of Dakota, north of the Missouri River and the Sun River, and east of the Continental Divide, and ordered that the same be set apart, as a reservation for the Blackfeet Tribe and other Tribes therein enumerated. *Kappler's Indian Affairs*, Vol. 1, P. 854.

Congress, by the Act of April 15, 1874 (18 Stat. 28) provided that a described tract of country in the Territory of Montana "be, and the same is hereby, set apart for the use and occupation of the" Blackfeet Tribe, and other Tribes therein enumerated. This tract was somewhat less than, but within the area described by President Grant, in his executive order of July 3, 1873. President Grant, by executive order on August 19, 1874, directed that the tract included in his executive order of July 5, 1873, and not embraced within the tract set apart by the Act of Congress of April 15, 1874, be set apart for the use and occupation of the Blackfeet Tribe and other Tribes. President Hayes, by executive order on July 13, 1880, added certain additional territory to the Blackfeet Reservation. *Kappler's Indian Affairs*, Vol. 1, P. 856. Congress, by the Act of May 1, 1888, approved an Agreement theretofore made between the commissioners on the part of the United States and the Blackfeet, whereby the Blackfeet Reservation was distinctly described (25 Stat. 129), and in consideration of which they relin-

quished their claim to much of the land theretofore included within their reservation. Another and later Agreement with the Blackfeet, approved by Act of Congress on June 10, 1896 (29 Stat. 353), still further reduced the reservation. By Article V of the Agreement it was expressly provided that there should be no allotment in severalty of the land, but that the whole reservation should continue to be held by these Indians as a communal grazing tract. By the Act of March 1st, 1907 (34 Stat. 1035) it was provided: "That as soon as all the lands embraced within the said Blackfeet Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all persons having tribal rights or holding tribal relations and who may rightfully belong on said reservation. That there shall be allotted to each member forty acres of irrigable land and two hundred and eighty acres of additional land valuable only for grazing purposes; or, at the option of the allottee, the entire three hundred and twenty acres may be taken in land valuable only for grazing purposes.

The Blackfeet Reservation was *created* by treaty, and this Court will take judicial notice of that fact.

Hudson Oil Co. v. Board, —— Wyo. ——, 52 Pac. (2d) 683 (Shoshone Reservation).

See also:

Clairmont v. United States, 225 U. S. 551, 56 L. Ed. 1201 (Flathead Reservation);

Spalding v. Chandler, 160 U. S. 394, 40 L. Ed. 469;

State v. Big Sheep, 75 Mont. 219 (Crow Reservation).

The decision of the State Court with respect to the inapplicability of Sections 398 a, b, and c was correct.

2. *The provisions of the Act of May 29, 1924, 43 Stat. 244, (Section 398, Title 25, U. S. C. A.) are not applicable here.*

The Act of May 29, 1924, (43 Stat. 244) is as follows:

> "An Act to authorize the leasing for oil and gas mining purposes of unallotted lands on Indian Reservations affected by the proviso to Section 3 of the Act of February 28, 1891.
>
> "That unallotted land on Indian reservations other than lands of the five civilized tribes and the Osage Reservation, subject to lease for mining purposes for a period of ten years under the proviso to Section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at Large, Page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands; Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

The proviso to Section 3 of the Act of February 28,

1891, (26 Stat. 795) to which Section 398 refers, appears as Section 397, Title 25, U. S. C. A. It provides:

> "Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed * * * ten years for mining purpose * * *."

Petitioner contends that the above sections do not apply for the following reasons:

(a) Specific provisions for the leasing of lands on the Blackfeet Reservation have been made by statute.

A review of the legislation of the Congress discloses a clear intention to deal specifically and individually with the Blackfeet Indian Reservation with respect to allotments and leases.

The general allotment Act (24 Stat. 388) became effective February 8th, 1887. Such Act purports to provide for the allotment of lands upon all reservations. Yet on February 11, 1887, a treaty was entered into with the Blackfeet covering, among other things, the allotment of lands on that reservation. This treaty was ratified by the Congress on May 1, 1888 (25 Stat. 113). The general allotment Act (24 Stat. 388) was amended February 28, 1891, (26 Stat. 794). On September 26, 1895 (29 Stat. 350), however, a treaty with the Blackfeet was ratified providing, among other things, that *no allotments* in severalty should be made upon the Blackfeet Reservation until requested in writing by a majority of the adult male members of the Tribe.

This was followed by the Act of March 1, 1907 (34 Stat. 1015-1035) specifically providing for the allotment

of lands on the Blackfeet Reservation. This latter Act was amended by the Act of June 30, 1919 (41 Stat. 17), which again deals specifically with the Blackfeet Reservation, both with respect to the allotment of land and with respect to the leasing of lands containing minerals.

On September 20, 1922, (42 Stat. 857) the Congress again specifically provided for the leasing of land on the Blackfeet Reservation for mining purposes.

The oil and gas here under consideration were reserved to the United States under the provisions of the Act of June 30, 1919 (41 Stat. 17) which provides:

> "The Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not theretofore allotted. * * *
>
> "Provided, that of the lands so allotted eighty acres of each allotment shall be designated as a homestead by the allottee and be evidenced by a trust patent and shall remain inalienable and non-taxable until Congress shall otherwise direct; * * *
>
> "Provided, further, That any and all minerals, including coal, oil and gas are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

The Act of September 20, 1922 (42 Stat. 857), Section 400, Title 25, U. S. C. A., also specifically refers to the Blackfeet Reservation as follows:

> "Lands reserved for school and agency purposes and all other unallotted lands on the Fort Peck and

Blackfeet Indian Reservations, in the State of Montana, reserved from allotments or other disposition may be leased for mining purposes under regulations prescribed by the Secretary of the Interior."

We find, then, a clear intention on the part of the Congress to deal with the Blackfeet Reservation outside of the general allotment and leasing statutes applicable to Indian Tribes and reservations in general. Thus, clearly, the general allotment statutes do not apply, for if they do the provisions therein contained, (24 Stat. 389, 31 Stat. 1085), that the land shall be held in trust *"for the sole use and benefit of the Indian* to whom such allotment shall have been made," and that at the expiration of the trust period the land shall be conveyed to the Indian *"free and clear of all charge or incumbrance whatsoever,"* are violated by the reservation of the oil and gas to the United States.

Adams v. Henderson, 168 U. S. 573, 42 L. Ed. 584;
Adams v. Reed, 11 Utah 480, 40 Pac. 720;
Stambaugh v. Smith, 23 Ohio St. 584.

Their place is taken by 41 Stat. 17, under which the oil here involved was reserved. In an equal degree, Sections 397 (26 Stat. 795) and 398 (43 Stat. 244) are general in their nature and do not change or repeal the specific statutes relating to the Blackfeet Reservation. In neither 397 nor 398 does there appear any intent, either expressed or implied, that the course pursued by the Congress in dealing specifically with the Blackfeet is to be altered in any respect. The intent, clearly, is otherwise. In neither 397 nor 398 do we find any express words repealing or amending 41 Stat. 17. The presumption is that no implied repeal was intended.

In re Crow Dog, 109 U. S. 556, 27 L. Ed. 1030;

United States v. Newton, 36 Fed. (2d) 425.

It is a rule of universal application that, under such circumstances, the statute dealing specifically with the subject matter must be applied.

Frost v. Wenie, 157 U. S. 46, 39 L. Ed. 614;
United States v. Nix, 189 U. S. 199;
Hemmer v. United States, 204 Fed. 898;
Lewis Statutory Construction (2nd Ed.) 526;
59 *C. J.* 1056.

Applying the above rules of construction and having in mind the intention of the Congress as expressed over a long period of years, it is clear that the provisions of 41 Stat. 17 must govern with respect to the leasing of the lands here involved. Neither 41 Stat. 17 nor 42 Stat. 857 contains a consent to the levying of taxes by the State. Without such consent the conclusion of the State Court was erroneous.

In closing this portion of our argument we may point out that the action of the Congress in dealing specifically with the Blackfeet is not unusual.

See:

43 Stat. 111 (Kaw Reservation—specifically consenting to taxation);
34 Stat. 539 (Osage Allotment Act);
43 Stat. 376 (Eastern Cherokees);
41 Stat. 1355 (Gros Ventre);
25 Stat. 642 (Chippewa).

(b) The lease and minerals here involved are not "unalotted" lands within the provisions of Section 398 (43 Stat. 244).

The land from which the oil has been produced was allotted August 11, 1922, to an individual Indian (R. 23, 24) under the provisions of 41 Stat. 17 (R. 28). By its plain provisions and title, Section 398 (43 Stat. 244) refers only to "unallotted" lands on Indian reservations affected by the proviso to Section 3 of the Act of February 28, 1891. This proviso, which, as we have seen, appears as Section 397, Title 25, relates only to lands *"not desired for individual allotments."* In other words, both 397 and 398 relate to unallotted tribal lands and not to lands allotted to individual Indians as is the situation here.

Strawberry Valley Cattle Co. v. Chapman, 13 Utah 454, 45 Pac. 348;
Kirby v. United States, 273 Fed. 391;
White Bear v. Barth, 61 Mont. 322, 203 Pac. 517.

We are confirmed in our conclusion that Sections 397 and 398 do not apply by an analysis of the various Statutes dealing with lands on the reservation.

On the Blackfeet Reservation there are four classes of land ownership, viz.: (1) Tribal lands; (2) lands allotted in trust without reservation of minerals; (3) lands allotted in trust with reservation of minerals; and (4) lands patented in fee. Lands patented in fee and the production of oil therefrom are taxable (Section 349). Lands allotted in trust without reservation are not taxable (Section 396) because no consent to such taxation is given.

Santa Rita Oil & Gas Co. v. Board, 54 Pac. (2d) 117.

Tribal lands and oil produced therefrom are taxable under Sections 397, 398 and 399.

But lands allotted in trust with respect to which the minerals have been reserved under 41 Stat. 17 are not taxable for the reason that there is no statutory provision allowing such taxation.

This classification of lands and the statutes applicable thereto is proper and logical. If such classification is not made, and respondents' contention that Section 398 applies, accepted, this Court is compelled to assume contrary to the plain intent of the Congress and contrary to the general rules of construction, that (1) the general provisions of Section 398 impliedly repeal or amend the specific provisions of 41 Stat. 17; (2) that lands *allotted* to individual Indians with minerals reserved to the United States are *unallotted* lands within the meaning of Section 398; and (3) that lands allotted to individual Indians with minerals reserved to the United States under the provisions of 41 Stat. 17 are lands "not desired for individual allotments" under the provisions of Section 397.

To merely state the necessary results of respondents' contentions would seem to demonstrate the fallacies therein.

Sections 397 and 398 provide for the leasing of "unallotted *lands*"—of *lands* "not desired for individual allotments." On the other hand, 41 Stat. 17 specifically provides for an allotment of lands on the Blackfeet Reservation, and further provides "that the land containing said minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe." In other words, 41 Stat. 17 while providing expressly for an allotment, allows a mineral lease by the Secretary. Sections 397, 398 and 399 assume that no allotment has been made, and that the land is not desired for individual allotments.

It is the theory of petitioner that the lease here under consideration is a lease upon allotted lands specifically provided for by 41 Stat. 17. If, however, we assume that the lands, so far as concern the minerals thereunder, are unallotted, as contended for by respondents and determined by the State Court (R. 32), then clearly the Act of September 20, 1922 (42 Stat. 857) applies, for therein we find specific provision for the leasing of unallotted lands on the Blackfeet Indian Reservation "reserved from allotment or other disposition." Respondents contended and the State Court held that the minerals were "unallotted lands" because they were reserved from allotment, a decision bringing the situation exactly within the provisions of 42 Stat. 857, and eliminating Section 398 from further consideration.

In the State Court it was suggested by counsel for respondents that from the last proviso contained in Section 398 it might be concluded that the land or property of an individual allottee was intended. But there can be no individual owner of unallotted land (31 C. J. 491); the proviso simply protects the Tribal land against any lien provided for in the State Statute.

(c) The Department of the Interior has not construed Section 398 as being applicable.

The lease here involved states that it is made "under and in" pursuance of Section 3 of the Act provided February 28, 1891 (26 Stat. L. 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress) (R. 7).

Section 3 of the Act of February 28, 1891 (26 Stat. 795) is Section 397 and the Act of May 29, 1924, is Section 398, both discussed in the next preceding section of this Brief.

From the above reference in the lease counsel for respondent argued and the Supreme Court of Montana concluded that Section 398 had been construed by the parties and the Department of the Interior to be applicable (R. 32).

The lease is upon a printed form, furnished by the Interior Department (Regulations, Department of Interior, July 23, 1924). As to its provisions the lessee had no choice. Upon its face it purports to be a lease of "Tribal Indian Land" (R. 6). It contains no provision protecting the Indian allottee or his property, save a general provision requiring that the lessee commit no waste. It apparently contemplates the erection of buildings and permanent improvements upon the surface (R. 9). It provides that if "usable water" is developed, it shall be turned over to the "reservation" (R. 9), and not the owner of the surface, as would naturally follow with respect to the condition here presented. Under such circumstances, it is not clear whether the mere use of a printed form containing inapplicable and erroneous references and provisions may be considered as a construction by the Department of the Interior. While it is doubtless true that a construction by the executive department is entitled to consideration,

> *Hawley v. Diller,* 178 U. S. 476, 44 L. Ed. 1157;
> *United States v. Johnson,* 124 U. S. 197, 31 L. Ed. 389,

yet the application of such rule to a given case assumes (1) a uniform construction for an appreciable length of time,

> *Louisville & N. R. Co. v. United States* 282 U. S. 740, 75 L. Ed. 672,

and (2) a construction that is not clearly erroneous,

United States v. Finnel, 185 U. S. 236, 46 L. Ed. 890,

and (3) a construction that is reasonable,

Robinson v. Lundrigan, 227 U. S. 173, 57 L. Ed. 468.

The supposed construction here contended for satisfies none of these requirements.

The lease form, which is a part of the government's regulations, was prepared with "unallotted tribal lands not needed for farming or agricultural purposes" in mind. (Regulations approved July 23, 1924.) Such regulations and lease form relate only to leases given under the proviso to Section 3 of the Act of February 28, 1891 (26 Stat. 795); the Act of May 29, 1924 (Sec. 398); and Section 26 of Act of June 30, 1919 (41 Stat. 31) as amended by 41 Stat. 1225-1231.

Since an allotment to an individual Indian presupposes that the land may be utilized for agricultural purposes (Sec. 331, Title 25), it can hardly be urged that the regulations here are a construction that leases of lands under 41 Stat. 17 are within the provisions of Sections 397 and 398.

Doubtless, the true situation is expressed in a statement by the First Assistant Secretary in a letter to the Attorney General:

> "Before any oil and gas mining leases were consummated on Blackfeet lands allotted under the Act of June 30, 1919, consideration was given to the matter of drafting regulations and a lease form. The conclusion was reached that the tribal regulations promulgated under the provisions of Section 3 of the Act of February 28, 1891, and the lease form prescribed thereunder would be satisfactory for use in

> leasing these lands. It was merely an oversight in this case not to strike out the reference in the lease form to Section 3 of the Act of February 28, 1891, as amended by the Act approved May 29, 1924, and insert in lieu a reference to the Act of June 30, 1919."

See also the construction by the Commissioner of Indian Affairs (R. 43, 44).

Under such circumstances it can not be contended that we have a uniform construction that Section 398 applies. If anything, the reverse is true.

In other words, the lease form here used is a part of the regulations promulgated by the Secretary expressly under the provisions of Sections 397 and 398, and which have nothing whatever to do with leases specifically provided for under 41 Stat. 17 and Section 400.

But assuming that there is such a uniform construction as is contended for by the respondents, such construction is clearly erroneous and unreasonable.

Long continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a Statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed.

> *Louisville & N. R. Co. v. United States,* 282 U. S. 740, 75 L. Ed. 672.

Situations somewhat similar, with respect to executive construction concerning the applicability of certain Statutes have heretofore arisen. In this connection the Court's attention is directed to a line of cases involving the issuance of patents to Indians who made homestead

entries on public lands under the Act of March 3, 1875 (18 Stat. L. 402) which provides that title to the lands should be inalienable for a period of five years from the date of issuance of the patent. In many of the cases where entries were made by Indians under the above cited Act, the patent was issued under the provisions of the Act of January 18, 1881 (21 Stat. L. 315) which declared that the land should be inalienable for a period of twenty years. It was an error on the part of the General Land Office to issue such patents, as the provisions of the Act of January 18, 1881, supra, concerning the issuance of patents, apply only to Winnebago Indians in Wisconsin. It has been uniformly held that such patents were erroneously issued and that there should be read into these patents the provisions of the Act under which the homestead was taken.

See:

Hemmer v. United States, 204 Fed. 898 (affirmed 241 U. S. 380);
United States v. Saunders, 96 Fed. 268;
Frazee v. Piper, 51 Wash. 278, 98 Pac. 760;
Felix v. Yaksum, 77 Wash. 519, 137 Pac. 1037.

From what has been said in the previous sections of this Brief, it clearly appears that the lease was not, and could not have been given under the provisions of Section 398. Just as clear is it that the lease must have been executed under either 41 Stat. 17, or Section 400. In either case there was, and is no consent to taxation, and a supposed erroneous construction by the Interior Department cannot create such a consent and so divest either the Blackfeet Tribe or petitioner of their right to immunity from taxation.

It is respectfully submitted that the decree of the Supreme Court of Montana should be reversed.

Respectfully submitted,

E. K. CHEADLE, JR.,
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Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1935

No. [redacted] 37

THE BRITISH AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Respondents

Brief of Respondents

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 953

THE BRITISH AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

Petitioner,

vs.

THE BOARD OF EQUALIZATION OF THE STATE OF MONTANA, AND JAMES H. STEWART, JOHN J. GREENE, AND SAM D. GOZA, MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Respondents;

THE BLACKFEET INDIAN TRIBE,

Intervener.

Brief of Respondents

ARGUMENT.

LEASE EXECUTED PURSUANT TO AUTHORITY OF ACT OF MAY 29, 1924 (43 Stat. 244).

The lease in question is denominated an "Oil and Gas Mining Lease, Tribal Indian Land", and was made under the authority of 43 Stat. 244 (25 U. S. C. A., Sec.

398), according to its own terms (R. 7). As the lease shows (R. 7) and the complaint avers (R. 2) and as Section 398 in fact requires, the lease was entered into with the consent of the Blackfeet Tribal Council. That it was proper to proceed under the provisions of Section 398 cannot be doubted. The oil and gas, as well as all other minerals, were reserved to the United States for the benefit of the Blackfeet Tribe of Indians (41 Stat. 17) from the trust patents issued to the individual members of the tribe, and to the extent of that reserved interest the Indian lands, of necessity, remained unallotted. These mineral resources are not attached to the land, allotted in severalty, but these rights and reserves are tribal interests and not interests in severalty. The mineral reserves were not divided in severalty. The owner of the land of such a Blackfeet allotment does not individually own the minerals thereunder. These reserves remain as tribal property. There is no difference in principle between a lease of minerals underneath unallotted lands and a lease of minerals underneath allotted lands from which the minerals have been reserved. In the one case, as in the other, the minerals are held by the United States for the benefit of the Blackfeet Indians in their tribal capacity. That must have been the view which Congress entertained when it enacted Section 398. From the language of the section it is obvious that Congress intended that the production of oil and gas from areas underneath restricted lands, that is lands for which trust patents had issued, should be placed in the same category as the production of oil and gas from areas underneath unrestricted lands so far as taxation by the state is concerned. If the section was meant to apply only to "unallotted lands", as the term is ordinarily understood, why was Congress at pains to provide that the tax

shall not become a lien or charge of any kind or character against the land of the Indian owner? Surely, so far as unallotted lands are concerned, it was not necessary to insert a provision of that kind in order to protect the tribe or any member of the tribe against tax liens.

Mid-Northern Oil Co. v. Walker, 268 U. S. 45, 45 S. Ct. 440, 69 L. Ed. 841.

In the brief of petitioner it is argued: "Had this Act been intended to include lands, the surface of which was allotted, logically the lease would have provided for reimbursement to the Indian owner for damages occasioned to fences, buildings, crops, etc., by reason of operations for oil and gas development. No such provision is found in the lease." But the lease does provide (R. 9) that "the lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land and suffer none to be committed upon the portion in his occupancy or use, take good care of the same." Any violation of this condition on the part of the lessee or its assignee would entitle the Indian owner to compensatory damages at least.

Section 398 has been construed by the executive department of government charged with its administration. The courts have uniformly held that the construction placed upon a statute by the officer, board or department charged with the duty of administering it is entitled to great weight and should not be overturned except for cogent reasons.

59 Corpus Juris 1025;

United States v. Jackson, 280 U. S. 183, 50 S. Ct. 143, 74 L. Ed. 361;

Federal Land Bank v. Warner, 292 U. S. 53, 54 S. Ct. 571, 78 L. Ed. 1120;

Globe Indemnity Co. v. Bruce, 81 Fed. (2d) 143.

MINERALS IN PLACE.

Minerals in place are land.

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991;
Selvey v. Grafton Coal & Coke Co., 72 W. Va. 680, 79 S. E. 656;
Kinder v. LaSalle County Carbon Coal Co., 301 Ill. 362, 133 N. E. 772;
Young v. Young, 307 Mo. 218, 270 S. W. 653, 39 A. L. R. 734;
Stern v. Great Southern Land Co., 148 Miss. 649, 114 South. 739.

A STATE MAY, WITH THE CONSENT OF CONGRESS, TAX AN INSTRUMENTALITY OF THE UNITED STATES.

A state may, with the consent of Congress, lay a tax on the instruments, means or agencies, provided or selected by the government of the United States to enable it to carry into execution its legitimate powers and functions. National banks are a good example of the exercise of such consent.

61 Corpus Juris 371;
2 Cooley on Taxation, Sec. 606, p. 1286;
Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353, aff. 268 U. S. 45, 69 L. Ed. 841.

Congress has the power to grant to the states the right to tax public property or property in which the United States retains such an interest as would otherwise exempt it, and where this is done no express acceptance by the state of the authority conferred is essential to the exercise thereof.

61 Corpus Juris 361;
Central Pacific Railroad Co. v. Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, aff. 21 Nev. 247, 30 Pac. 686.

TAX ON NET PROCEEDS OF MINES IS TAX ON PERSONAL PROPERTY.

The net proceeds of mines being themselves personal property, the tax thereon cannot be other than a personal property tax.

Section 2088, Revised Codes of Montana 1921;
Birney v. Warren, 28 Mont. 64, 72 Pac. 293;
Board of Com'rs. of Sweetwater County v. Bernardin, 74 Fed. (2d) 809, cert. denied 295 U. S. 731, 79 L. Ed. 1680.

It is in effect an ad valorem tax on personal property and for that reason; if for no other, does not violate the rule laid down in *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L. Ed. 234.

1 Cooley on Taxation, Sec. 52, p. 143;
Byrne v. Fulton Oil Co., 85 Mont. 329, 278 Pac. 514;
Pingree v. Auditor General, 120 Mich. 95, 78 N. W. 1025.

Section 4 of the Enabling Act and the second paragraph of Ordinance No. 1 exempt certain Indian lands from taxation but do not include personal property owned by Indians. In *Three Foretops v. Ross*, 73 Mont. 6, 235 Pac. 334, the court held that horses belonging to a tribal Indian were not subject to taxation by the state, but this was on the theory that ownership thereof was acquired directly or indirectly through the use of government supplies and money and therefore the property was charged with a trust.

INDIAN LANDS NOT AFFECTED BY SECTION 2 OF ARTICLE XII OF THE MONTANA CONSTITUTION.

In *British-American Oil Producing Co. v. Board of Equalization*, 54 Pac. (2d) 129, the Supreme Court of Montana construed Section 2 of Article XII of the Montana Constitution and held that Indian lands do not come within its purview. This construction is binding upon the court.

25 Corpus Juris 832;
Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866.

Property held by the United States as trustee for the benefit of others is not the kind of property which is exempt from taxation under the provisions of said Section 2.

61 Corpus Juris 418;
2 Cooley on Taxation, Sec. 629, p. 1324;
People v. University of Illinois, 377 Ill. 377, 159 N. E. 811;
Security Savings & Trust Co. v. Lane County, 53 Pac. (2d) 33;
State v. Board of Com'rs, 53 S. D. 609, 222 N. W. 583.

Respectfully submitted,

RAYMOND T. NAGLE,
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Counsel for Respondents.

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IN THE

Supreme Court of the United States

October Term, 1936

No. 37

THE BRITISH AMERICAN OIL PRODUCING COMPANY, a Corporation,

Petitioner,

v.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

Brief of Respondents

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THUNDER'S, HELENA

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IN THE

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THE BRITISH AMERICAN OIL PRODUCING COMPANY, a Corporation,

Petitioner,

v.

THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

THE BLACKFEET INDIAN TRIBE,

Intervener.

Brief of Respondents

STATEMENT OF RESPONDENTS' POSITION.

The position of respondents is (a) that the Blackfeet Reservation is an executive order Indian reservation; (b) that the minerals reserved to the United States from trust patents issued to individual members of the Blackfeet tribe are unallotted lands, and (c) that under the provisions of Sections 398a, 398b, and 398c, 25 U. S. C.

A., the state taxes complained of in petitioner's brief are properly collectible. Should it be determined, however, that the Blackfeet Reservation is not an executive order Indian Reservation, it is the position of respondents (a) that the lease in question was executed under the authority of Section 398, 25 U. S. C. A.; (b) that in any event the petitioner is estopped from claiming it was not, and (c) that the state taxes complained of are properly collectible.

ARGUMENT.

History of Blackfeet Indian Reservation.

On the 17th day of October, 1855, a treaty was concluded between the United States and certain nations, tribes and bands of Indians, including the Blackfeet tribe. It was ratified by the Senate on April 15, 1856, and proclaimed by the President on April 25, 1856. Under its provisions the nations, tribes and bands affected were granted certain rights and privileges in the use and enjoyment of large tracts of land in the then Territory of Nebraska but now within the boundaries of the State of Montana (2 *Kappler's Indian Affairs* 552; 11 Stat. 657). By executive order of President Grant, made on July 5, 1873, certain described lands in the then Territory of Montana were set apart as a reservation for the Blackfeet and kindred tribes of Indians, as recommended by the Secretary of the Interior and the Commissioner of Indian Affairs. By executive order of President Grant, made on August 19, 1874, so much of these lands was restored to the public domain as to make what remained correspond with the tract set apart by Act of Congress of April 15, 1874, (18 Stat. 28) for the same purpose. By executive order of President Grant, made

on April 13, 1875, certain lands in the Territory of Montana were set apart as an addition to the existing reservation for the Blackfeet and kindred tribes of Indians. By executive order of President Hayes, made on July 13, 1880, a part of this addition was restored to the public domain (1 *Kappler's Indian Affairs* 855-857). In accordance with an agreement made between representatives of the government and the Indians concerned the reservation was further reduced in area by an Act of Congress passed on May 1, 1888 (1 *Kappler's Indian Affairs* 261, 25 Stat. 113). Finally, under an agreement entered into on the 26th day of September, 1895, between representatives of the government and the Indians of the Blackfeet Reservation and ratified by Congress on the 10th day of June, 1896, a considerable portion of the reservation as it then existed was ceded to the United States (1 *Kappler's Indian Affairs* 604; 29 Stat. 353).

SECTIONS 397, 398, 398a, 398b, AND 398c, 25 U. S. C. A.

Sections 397, 398, 398a, 398b, and 398c, of Title 25, United States Code Annotated, read as follows:

> "Section 397. Leases of lands for grazing or mining. Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (Feb. 28, 1891, c. 383, § 3, 26 Stat. 795.)

"Section 398. Leases of unallotted lands for oil and gas mining purposes. Unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under section 397 of this title may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner. (May 29, 1924, c. 210, 43 Stat. 244.)

"Section 398a. Leases of unallotted lands for oil and gas mining purposes within executive order Indian reservations. Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in section 398 of this title. (Mar. 3, 1927, c. 299, § 1, 44 Stat. 1347.)

"Section 398b. Same; proceeds from rentals, royalties, and bonuses; disposition. The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in

the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided*, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress. (Mar. 3, 1927, c. 299, § 2, 44 Stat. 1347.)

"Section 398c. Same; taxes. Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. (Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.)"

BLACKFEET INDIAN RESERVATION IS AN EXECUTIVE ORDER RESERVE.

The Act of Congress of April 15, 1874, but recognized and confirmed in a sense the order of President Grant establishing and delimiting the Blackfeet Indian Reservation. It is an executive order Indian reservation (*Spalding v. Chandler*, 160 U. S. 394, 40 L. Ed. 469;

Minnesota v. Hitchcock, 185 U. S. 373, 46 L. Ed. 954; *Donnelly v. United States*, 228 U. S. 243, 57 L. Ed. 820; *United States v. Midwest Oil Co.*, 236 U. S. 459, 59 L. Ed. 673; 17 Ops. Atty. Gen. 258; 33 Land Dec. 205). It is listed as such with one hundred thirty-two others in the index to 1 *Kappler's Indian Affairs* at page 1102. It also occupies a place, with many more of like character, in the annual report of the Commissioner of Indian Affairs for 1886, under the heading "Executive Orders Relating to Indian Reservations", pages 292-380. It is noteworthy that the Shoshone, the Flathead, the Osage and hundreds of other Indian reservations are not mentioned in either volume as executive order reservations. Moreover, before the reservation was established by President Grant in 1873 there was no Blackfeet Indian Reservation in the real sense. It is reasonable to assume, therefore, that when Congress enacted Sections 398a, 398b, and 398c, 25 U. S. C. A., it had in mind reservations of the Blackfeet Indian type.

LEASE MADE UNDER AUTHORITY OF 43 STAT. 244.

The lease in question is denominated an "Oil and Gas Mining Lease, Tribal Indian Land", and was made under the authority of 43 Stat. 244 (Sec. 398, 25 U. S. C. A.) according to its own terms (R. 7). As the lease shows (R. 6) and the complaint avers (R. 2) and as Section 398 in fact requires, the lease was entered into with the consent of the Blackfeet Tribal Council. It was executed by the Superintendent of the Blackfeet Indian Reservation, as lessor, in behalf of the Blackfeet Tribe of Indians, and the Consolidated Gas Company, as lessee. It was duly approved by the First Assistant Secretary of the Interior (R. 2, 14) and afterwards assigned by the lessee to the petitioner herein (R. 2, 14). The assign-

ment was approved by the Assistant Secretary of the Interior (R. 3, 16). Thereafter, pursuant to the terms and provisions of the lease the petitioner entered upon the leased premises and proceeded to develop the same for oil and gas purposes and the production of crude oil, and did in fact drill thereon to completion ten wells which are producing petroleum in paying quantities (R. 3).

In executing the lease it was proper to proceed under the provisions of Section 398. The oil and gas, as well as all other minerals, were reserved to the United States for the benefit of the Blackfeet Tribe of Indians (41 Stat. 17) from the trust patents issued to the individual members of the tribe, and to the extent of that reserved interest the Indian lands, of necessity, remained unallotted. Two estates were created, one in the surface and the other in the minerals beneath the surface (*Taylor v. Tayrien*, 51 Fed. (2d) 884, cert. denied 284 U. S. 672; *Adams v. Osage Tribe of Indians*, 59 Fed. (2d) 653, cert. denied 287 U. S. 652, 653; *British-American Oil P. Co. v. Board of Equalization*, 101 Mont. 293, 54 Pac. (2d) 129). These mineral resources are not attached to the land, allotted in severalty, but these rights and reserves are tribal interests and not interests in severalty. The mineral reserves were not divided in severalty. The owner of the land of such a Blackfeet allotment does not individually own the minerals thereunder. These reserves remain as tribal property. There is no difference in principle between a lease of minerals underneath unallotted lands and a lease of minerals underneath allotted lands from which the minerals have been reserved. In the one case, as in the other, the minerals are held by the United States for the benefit of the Blackfeet Indians in their tribal capacity. That must have been the view

which Congress entertained when it enacted Section 398. From the language of the section it is obvious that Congress intended that the production of oil and gas from areas underneath restricted lands, that is lands for which trust patents had issued, should be placed in the same category as the production of oil and gas from areas underneath unrestricted lands, so far as taxation by the state is concerned. If the section was meant to apply only to "unallotted lands", as the term is ordinarily understood, why was Congress at pains to provide that the tax shall not become a lien or charge of any kind or character against the land of the Indian owner? Surely, so far as unallotted lands are concerned, it was not necessary to insert a provision of that kind in order to protect the tribe or any member of the tribe against tax liens.

Mid-Northern Oil Co. v. Walker, 268 U. S. 45, 45 S. Ct. 440, 69 L. Ed. 841.

MINERALS IN PLACE ARE LAND.

It is a well settled principle that minerals in place are land.

Huss v. Jacobs, 210 Pa. 145, 59 Atl. 991;
Selvey v. Grafton Coal & Coke Co., 72 W. Va. 680, 79 S. E. 656;
Kinder v. LaSalle County Carbon Coal Co., 301 Ill. 362, 133 N. E. 772;
Young v. Young, 307 Mo. 218, 270 S. W. 653, 39 A. L. R. 734;
Stern v. Great Southern Land Co., 148 Miss. 649, 114 South. 739.

SECTION 398 CONSTRUED BY EXECUTIVE DEPARTMENT.

Section 398 has been construed by the executive department of government charged with its administration. The courts have uniformly held that the construction placed upon a statute by the officer, board or department charged with the duty of administering it is entitled to great weight and should not be overturned except for cogent reasons.

59 *Corpus Juris* 1025;
United States v. Jackson, 280 U. S. 183, 50 S. Ct. 143, 74 L. Ed. 361;
Federal Land Bank v. Warner, 292 U. S. 53, 54 S. Ct. 571, 78 L. Ed. 1120;
Globe Indemnity Co. v. Bruce, 81 Fed. (2d) 143.

The statements of the First Assistant Secretary of the Interior and the Commissioner of Indian Affairs (Pet. brief 29, 30), made apparently with the view of bolstering the position of the petitioner and coming as they did after the controversy had arisen, are not entitled to any consideration.

UNALLOTTED LANDS OF THE FIVE CIVILIZED TRIBES AND THE OSAGE RESERVATION ONLY EXCEPTED FROM SECTION 398.

It will be observed that unallotted lands on all Indian reservations but those of the Five Civilized Tribes and the Osage Reservation come under the provisions of Section 398. Certain designated exceptions having been made by the statute, it must be held to be all-embracing otherwise.

2 *Lewis' Sutherland Stat. Constr.* sec. 494, p. 923;
59 *Corpus Juris* 1092;
25 *Ruling Case Law* 983, Sec. 230;
Federal Crude Oil Co. v. Yount-Lee Oil Co., 122 Tex. 21, 52 S. W. (2d) 56;
Evans v. McCabe, 164 Tenn. 672, 52 S. W. 159;
Brahmey v. Rollins, 179 Atl. (N. H.) 186.

SECTION 10 OF CHAPTER 4, ACT OF JUNE 30, 1919, AND SECTION 398, 25 U. S. C. A., SHOULD BE CONSTRUED TOGETHER.

Section 10 of Chapter 4, Act of June 30, 1919 (41 Stat. 17), and Section 398, 25 U. S. C. A. (43 Stat. 244), relating as they do to the same subject, should be construed together (59 C. J. 1042), and to the extent of any conflict between them the latter modifies or qualifies the former (59 C. J. 1051). Under the Act of June 7, 1897 (30 Stat. 62, 72), Quapaw Indians were empowered to lease their lands for farming or grazing purposes for a term of three years or for mining purposes for a term of ten years. Under the Act of March 3, 1909 (Sec. 396, 25 U. S. C. A.), Indians generally, except members of the Five Civilized Tribes and Osage Indians in Oklahoma, were empowered to lease their lands for mining purposes for any term of years, with the consent of the Secretary of the Interior. In *Hallam v. Commerce Mining & Royalty Co.*, 49 Fed. (2d) 103, cert. denied 284 U. S. 643, it was held that Quapaw Indians were entitled to the benefit of Section 396 and so authorized to lease their lands for mining purposes under its provisions with the consent of the Secretary of the Interior.

THE PROVISIONS OF SECTION 398c APPLICABLE.

The Blackfeet Reservation being an executive order Indian reservation, the provisions of Section 398c are applicable to every phase of the controversy without regard to the particular statute under the authority of which the lease was made.

Hudson Oil Co. v. Board of County Com'rs, 49 Wyo. ....., 52 Pac. (2d) 683.

THE PETITIONER IS ESTOPPED.

But should it be determined by the Court that the Blackfeet Reservation is not an executive order Indian reservation and be conceded by the respondents, which it is not, that the lease could not properly be made under the provisions of Section 398, still it must be remembered that this action was not brought to reform or cancel the same (*United States v. Noble*, 237 U. S. 74, 59 L. Ed. 844; *Smith v. McCullough*, 270 U. S. 456, 70 L. Ed. 682). On the contrary, the petitioner is standing upon it, though at the same time desperately attempting to straddle the issues involved. The petitioner, as the assignee of the Consolidated Gas Company, took the lease as it found it and cannot now change its position to its own advantage. It accepted the lease with its benefits as well as its obligations. Under the circumstances the petitioner should not be heard to say that the lease is all right so far as the production of oil and gas is concerned, but is ineffective when it comes to taxation affecting such production. The petitioner is therefore estopped from denying the recital in the lease to the effect that it was made under the authority of 43 Stat. 244 (Sec. 398, 25 U. S. C. A.).

2 *Cooley on Taxation*, secs. 803, 834, 899;
61 *Corpus Juris* 250, Sec. 237;
21 *Corpus Juris* 1091, secs. 70, 73;
Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649;
Superior Coal Co. v. Musselshell County, 98 Mont. 501, 41 Pac. (2d) 14;
Robert Oil Corp. v. Jones, 23 S. W. (2d) 472;
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Minneapolis, St. P. & S. S. M. Ry. Co. v. Oppegard, 18 N. D. 1, 118 N. W. 830;
Society For Establishing Useful Manufactures v. Paterson, 89 N. J. Law 208, 98 Atl. 440;
Moore v. Furnas County Live Stock Co., 78 Neb. 558, 111 N. W. 464;
Gunter v. Jackson, 130 Miss. 686, 94 South. 842;
United States v. Southern Oregon Co., 196 Fed. 423;
Day v. Simms Oil Co., 23 Fed. (2d) 923;
People v. State Board of Tax Com'rs, 160 App. Div. 771, 146 N. Y. S. 112;
In re Cronin's Will, 257 N. Y. S. 496.

The cases of *Hemmer v. United States*, 204 Fed. 898; *United States v. Saunders*, 96 Fed. 268; *Frazee v. Piper*, 98 Pac. 760, and *Felix v. Yaksum*, 137 Pac. 1037, cited in petitioner's brief at page 31, are not in point. The questions before the court in each of them are altogether dissimilar to the questions involved here.

A STATE MAY, WITH THE CONSENT OF CONGRESS, TAX AN INSTRUMENTALITY OF THE UNITED STATES.

A state may, with the consent of Congress, lay a tax on the instruments, means or agencies, provided or selected by the government of the United States to enable

it to carry into execution its legitimate powers and functions. National banks are a good example of the exercise of such consent.

61 *Corpus Juris* 371;
2 *Cooley on Taxation*, sec. 606, p. 1286;
Mid-Northern Oil Co. v. Walker, 65 Mont. 414, 211 Pac. 353, aff. 268 U. S. 45, 69 L. Ed. 841.

Congress has the power to grant to the states the right to tax public property or property in which the United States retains such an interest as would otherwise exempt it, and where, as here, this is done no express acceptance by the state of the authority conferred is essential to the exercise thereof.

61 *Corpus Juris* 361;
Central Pacific Railroad Co. v. Nevada, 162 U. S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, aff. 21 Nev. 247, 30 Pac. 686.

Apparently the petitioner has abandoned its claim that the corporation license tax imposed by the State of Montana is invalid as no mention thereof is made in petitioner's brief (R. 5, 6).

We respectfully submit that the decree of the Supreme Court of Montana should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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THE BRITISH-AMERICAN OIL PRODUCING COMPANY, A CORPORATION,

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THE BOARD OF EQUALIZATION of the State of Montana, and JAMES H. STEWART, JOHN J. GREENE, and SAM D. GOZA, members of the State Board of Equalization of the State of Montana,

Respondents.

THE BLACKFEET INDIAN TRIBE,

Intervener.

PETITION FOR REHEARING

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

COMES NOW the British-American Oil Producing Company, petitioner, and petitions this Honorable Court

for a rehearing herein and as grounds for such rehearing respectfully shows:

A.

The Supreme Court in its decision concludes "that the lease was given under the special provision in the Act of June 30, 1919, taken in connection with the general provisions. The Act of May 29, 1924, is one of the general provisions, and in it Congress assents to taxation by the State of the production of oil and gas through a lease given under its provisions."

B.

The conclusion of the Court that the lease was given under the special provision in the Act of June 30, 1919, is in accord with petitioner's contentions herein. The conclusion that the Act of May 29, 1924, is a general provision and is applicable is contrary to petitioner's contentions, and is erroneous for the following reasons:

1. The Act of May 29th, 1924 (43 Stat. 242), both by title and context, refers specifically to and is restricted by the provisions of the proviso to Section 3 of the Act of February 28th, 1891.

The proviso to Section 3 of the Act of February 28th, 1891, is a part of a general allotment Act (26 Stat. 794).

The general allotment Act of February 28th, 1891, was superseded so far as concerns the Blackfeet Tribe and Reservation by the Agreement of September 28th, 1895 (29 Stat. 355), leaving effective, however, the proviso to Section 3 having reference to the leasing of unallotted lands.

From February 28th, 1891, to June 30th, 1919, therefore, unallotted lands on the Blackfeet Reservation were leased for grazing and mining purposes under the proviso to Section 3 of the Act of February 28th, 1891.

2. On June 30th, 1919, the Congress passed a new allotment Act, specifically providing for allotments on the Blackfeet Reservation and further providing "that any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, that the land containing such minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe." (41 Stat. 17.)

The Act of September 20th, 1922 (42 Stat. 857), further specifically provides for the leasing of unallotted lands reserved from allotment on the Blackfeet Reservation. Its provisions are as follows:

"That lands reserved for school and agency purposes and all other unallotted lands on the Fort Peck and Blackfeet Reservations, in the State of Montana, reserved from allotment or other disposition, may be leased for mining purposes under regulations prescribed by the Secretary of the Interior."

As concerns the Blackfeet Reservation, the Acts of June 30th, 1919, and September 20th, 1922, clearly supersede, and are in conflict with the leasing provisions contained in the proviso to Section 3 of the Act of February 28th, 1891. Such proviso required the lease to be authorized by the tribal council. No such requirement appears either in the Act of June 30th, 1919, or in the Act of

September 20th, 1922. The proviso to the Act of February 28th, 1891, limits the term of the lease to ten years. No such limitation appears in either the Act of June 30th, 1919, or the Act of September 20th, 1922. The proviso to the Act of February 28th, 1891, requires the recommendation of the agent in charge of the reservation. No such provision appears in either the Act of June 30th, 1919, or the Act of September 20th, 1922. The proviso to the Act of February 28th, 1891, provides for the approval of the lease by the Secretary of the Interior. No such provision appears in either the Act of June 30th, 1919, or the Act of September 20th, 1922. Under the latter Act, the lease may be given without the consent of the tribal council, for such term, and upon such conditions, as the Secretary of the Interior may prescribe.

Under the Acts of June 30th, 1919, and September 20th, 1922, the Secretary of the Interior is given large discretion with respect to the propriety, the term, and the conditions of the lease. Under the Acts of February 28th, 1891, and May 29th, 1924, his only discretion is that of approval. The provisions for leasing found in the Act of June 30th, 1919, and September 20th, 1922, are no more meager or wanting in detail than those found generally in Indian leasing statutes:

See:

Act of March 3, 1921 (41 Stat. 1232);
Act of May 16, 1916 (39 Stat. 128);
Act of May 31, 1900 (31 Stat. 229);
Act of March 3, 1909 (35 Stat. 783);
Act of April 28, 1924 (43 Stat. 111);
Act of June 25, 1910 (36 Stat. 856);

all of which provide for the leasing of allotted and unallotted lands for various purposes in conformity with such rules and regulations as the Secretary of the Interior may prescribe.

Where, as here, there are later enacted specific provisions relating to the leasing of unallotted lands on the Blackfeet Reservation for mineral purposes, such specific provisions supersede the general provisions of the proviso to Section 3 of the Act of February 28th, 1891. See Townsend v. Little, 109 U. S. 504, 27 L. Ed. 1012; State v. Mills, 81 Mont. 86, 261 Pac. 885; Reagan v. Boyd, 59 Mont. 453, 197 Pac. 832. This was inferentially determined by the decision of this Court in the present case, when it concluded that the lease was given under the special provision in the Act of June 30th, 1919.

3. By its title, the Act of May 29th, 1924, relates only to the leasing of unallotted lands *"affected by the proviso to Section 3 of the Act of February 28th, 1891."*

The body of the Act of May 29th, 1924, provides that "unallotted land on Indian Reservations other than lands of the Five Civilized Tribes and of the Osage Reservation *subject to lease for mining purposes for a period of ten years under the proviso to Section 3 of the Act of February 28th, 1891* (Twenty-sixth Statutes at Large, Page 795), may be leased at public auction by the Secretary of the Interior with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years . . . . "

It is thus clear that the lands authorized to be leased under the provisions of the Act of May 29th, 1924, are

the identical lands authorized to be leased by the proviso to Section 3 of the Act of February 28th, 1891.

If the proviso to Section 3 of the Act of February 28th. 1891, has been superseded, so far as concerns the Blackfeet Reservation by the provisions of the Acts of June 30th, 1919, and September 20th, 1922, then, the Act of May 29th, 1924, referring specifically, as it does to the Act of February 28th, 1891, and restricted in its application to lands authorized to be leased thereunder, may not be held applicable. In other words, the Act of May 29th, 1924, relates solely to lands affected by, or subject to lease under, the proviso to Section 3 of the Act of February 28th, 1891. The title to and the body of the Act of May 29th, 1924, restrict the application of that Act to such lands. Since at all times after June 30th, 1919, minerals on the Blackfeet Reservation were subject to lease under the Act of June 30th, 1919, and not the Act of February 28th, 1891, it is clear that the provisions of the Act of May 29th, 1924, do not apply.

4. No consent to taxation by the State, of the oil and gas produced, is given by either the Act of June 30th, 1919, or the Act of September 20th, 1922.

The Supreme Court concludes in its decision that the consent to taxation found in the Act of May 29th, 1924, applies as a general provision to be read in connection with the Act of June 30th, 1919. The effect of this conclusion is to make applicable, by construction, a portion of a statute which is otherwise clearly inapplicable. Petitioner submits that if the lease was given under the provisions of the Act of June 30th, 1919, which superseded, so far as concerns the Blackfeet Tribe, the pro-

viso to the Act of February 28th, 1891, then a consent to taxation of leases upon lands affected by the proviso to the Act of February 28th, 1891, may not; by construction, be inserted in the Act of June 30th, 1919. In short. if the lands here under lease are not lands affected by, and subject to lease under the proviso to Section 3 of the Act of February 28th, 1891, then the consent to taxation found in the Act of May 29th, 1924, may not be applied to oil produced under leases given pursuant to the Act of June 30th, 1919. In the construction of a statute, the intention of the Congress must be deduced from the whole statute and not a part thereof. (Hellmich v. Hellman, 276 U. S. 233, 72 L. Ed. 544; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844).

The consent to taxation found in the Act of May 29th, 1924, relates specifically to oil and gas and other minerals produced "on such lands," that is to say, lands affected by and subject to lease under the proviso to Section 3 of the Act of February 28th, 1891. In connection with the Act of May 29th, 1924, we have, then, an Act restricted, by its title, to unallotted lands on Indian Reservations affected by the proviso to Section 3 of the Act of February 28th, 1891. Exactly the same restriction is found in the body of the Act, both so far as concerns the leasing feature and the tax feature. Where the title to an Act restricts its application, such application may not be extended by construction. (Meese v. Northern Pac. Ry. Co., 127 C. C. A. 622, 211 Fed. 254.)

The provisions of the Act of May 29th, 1924, are not general in their application, but are restricted to the exact lands mentioned therein; otherwise, no purpose

could have been served by the enactment of the Act of March 3rd, 1927 (44 Stat. 1347), providing for the leasing of unallotted lands on executive order reservations and the taxing of oil and gas produced on such leases.

The supposed construction by the Department of the Interior arising from the reference to the Acts of February 28th, 1891, and May 29th, 1924, has been expressly repudiated by that Department. (R. 43.)

The conclusion that the provisions of the Act of May 29th, 1924, apply, can only lead to confusion. Thus, under the decision of the Court, must the Secretary of the Interior now obtain, as a condition precedent, the consent of the tribal council? Is the initial term of the lease limited to ten years? Must the lease be offered at public auction? Or may the Secretary of the Interior prescribe such rules and regulations with respect to the matter as may seem proper under the circumstances, as contemplated by the Act of June 30th, 1919?

It is, therefore, respectfully submitted that the conclusion of the Court that the consent to taxation found in the Act of May 29th, 1924, applies to the lease given under the Act of June 30th, 1919, is erroneous and that a rehearing should be granted herein.

E. K. CHEADLE, JR.,
E. J. McCABE,
H. C. HALL,
Counsel for Petitioner.

CERTIFICATE

The undersigned, E. K. Cheadle, Jr., E. J. McCabe and H. C. Hall, counsel for the petitioner, the British-American Oil Producing Company in the above and foregoing Petition for Rehearing do hereby certify that this Petition for Rehearing is presented in good faith and not for the purposes of delay.

E. K. CHEADLE, JR.,
E. J. McCABE,
H. C. HALL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 37.—October Term, 1936.

The British-American Oil Producing Company, Petitioner, *vs.* The Board of Equalization of the State of Montana, et al.	Certiorari to the Supreme Court of the State of Montana.

[December 7, 1936.]

Mr. Justice Van Devanter delivered the opinion of the Court.

A judgment of the Supreme Court of Montana sustaining state taxes on the production of oil and gas under a lease covering such minerals in certain lands of the Blackfeet Indians (101 Mont. 393) is here under review.

These Indians are wards of the United States and have been occupying a reservation in Montana. During recent years they have received allotments in severalty from lands in the reservation, and they now hold the allotments under so-called trust patents, whereby the United States declares that it will retain the title for a period of twenty-five years in trust for the use and benefit of the several allottees, and at the expiration of that period will convey the same by patent to them or their heirs. Under the terms of the controlling statute, as also under the terms of the patents, all minerals, including coal, oil and gas, in or under the allotted lands are reserved to the United States for the benefit of the tribe "until Congress shall otherwise direct".

The petitioner holds a mining lease covering "all the oil and gas deposits in or under" certain of these allotted lands, a stated share of the gross production being reserved to the United States for the benefit of the Indian tribe as the lessor's royalty. The lease was authorized by a resolution of the tribal council, was recommended by the United States agent in charge of the reservation, was given for a term of five years from the date of its approval, was approved by the Secretary of the Interior October 5, 1934, and re-

cites that it was given in accordance with § 3 of the Act of February 28, 1891, c. 383, 26 Stat. 795, as amended by Act of May 29, 1924, c. 210, 43 Stat. 244.

The taxes in question are a gross production tax and a net proceeds tax, and it is conceded that the State is without power to apply either to the production under this lease, save and except as Congress may have given its assent. Whether Congress has given its assent is the ultimate question, and this turns on the subordinate questions (a) which of several statutes controls the leasing of tribal lands in this reservation for mining oil and gas, and (b) whether the reserved oil and gas deposits underlying allotted lands in this reservation constitute unallotted lands in the sense of these statutes.

There have been two related but distinct lines of legislation respecting the leasing of tribal Indian lands for mining purposes. The older and more general line has been regarded uniformly as including lands in reservations created by legislation, such as a treaty or congressional enactment; and has also been regarded at times as including, and at other times as excluding, lands in a reservation created by executive order. The proviso to § 3 of the Act of February 28, 1891, and the Act of May 29, 1924, both before mentioned, belong to the first line. The later and narrower line, which doubtless was prompted by diverse administrative interpretations of the other, is in terms confined to lands in reservations created by executive order. The Act of March 3, 1927, c. 299, 44 Stat. 1347, belongs to this line.

We are of opinion, as was the state court, that the Blackfeet reservation, as existing in recent years, was created by legislation and not by executive order.

The original territory of the Blackfeet and other Indians associated with them included a large area, as is shown by a treaty of September 17, 1851, 2 Kappler Indian Affairs, 2d Ed., 594, and a treaty of October 17, 1855, 11 Stat. 657. Under executive orders of 1873 and 1874, an Act of Congress of April 15, 1874, c. 96, 18 Stat. 28, and executive orders of 1875 and 1880, the Blackfeet and certain of the other Indians associated with them came to occupy a large part of this original territory as a reservation specially set apart for them.

By an agreement or convention, ratified by Congress May 1, 1888, c. 213, 25 Stat. 113, which recited various considerations moving from the Blackfeet to the United States and the reverse, and from the Blackfeet to their associates and the reverse, much of the earlier reservation was ceded to the United States, and three separate reservations, all within the limits of the earlier reservation, were created, one of these being set apart for the Blackfeet and the other two for the other Indians. By another agreement or convention, ratified by Congress June 10, 1896, c. 398, 29 Stat. 321, 353, which disclosed various considerations moving from the Indians to the Government and the reverse, part of the separate Blackfeet reservation was ceded to the United States, and the remainder was set apart as the tribe's future reservation. This last reservation is the one with which we now are concerned. It rests entirely on the agreements or conventions which were ratified and given effect by Congress. The executive orders before mentioned, evidently designed to be temporary, have been superseded by congressional action and no longer are of any force.

We turn, therefore, to the legislation bearing on the leasing for mining purposes of tribal lands in such a reservation. We say "tribal lands" because (1) here the mineral deposits did not pass to the allottees but were reserved for the benefit of the tribe, and (2) other and distinct legislation controls the leasing for mining purposes of lands of individual allottees where there is no reservation of the mineral deposits.

The proviso to § 3 of the Act of February 28, 1891, reads:

"Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the council speaking for such Indians, for a period not to exceed . . . ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior."

The Act of May 29, 1924, provides that "unallotted land on Indian reservations", other than lands of the Five Civilized Tribes and of the Osage Reservation, which are subject to lease for mining purposes under the above quoted proviso,

"may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil

and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities . . . : Provided, that the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands; Provided, however, that such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner."

The present lease recites that it was given under these general provisions, and the state court regarded them as both applicable and controlling.

The petitioner does not question that the reservation, as existing and occupied by the tribe in recent years, comes within the terms of the proviso in the Act of 1891 as lands which the Indians "have bought and paid for". Doubtless this is because the petitioner recognizes that by uniform administrative practice and by judicial decision this part of the proviso has been construed as not confined to lands acquired by Indians through the payment of a consideration in money, but equally including lands reserved for Indians in return for a cession or surrender by them of other lands, possessions or rights.[1] Further comment in this regard is not necessary.

Obviously the mineral deposits which are the subject of the lease are not needed for farming or agricultural purposes and are not desired for individual allotments.

The issue of the trust patents containing, as the statute requires, a reservation for the benefit of the tribe of all minerals, including oil and gas, in or under the allotted land, operates to carve out of such land and create a distinct estate consisting of the minerals. This estate is in itself land, and, being reserved for the benefit of the tribe, it is tribal land, and is unallotted.

What has been said, unless deflected by matters which remain to be noticed, shows, we think, that the reserved mineral estate which is the subject of the lease comes in all particulars within the terms of the general provisions before quoted, and that the lease should be regarded as authorized by that legislation and given under it.

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[1] 25 Land Dec. 408; Strawberry Valley Cattle Co. *v.* Chipman, 13 Utah 454, 462, *et seq.*

But it is urged that there are other provisions specifically dealing with the leasing of the Blackfeet lands for mining purposes and that these provisions fully cover that field and therefore render the general legislation inapplicable. There are provisions expressly relating to such leasing of these lands, and therefore it becomes necessary to consider their scope and effect.

The Act of June 30, 1919, c. 4, 41 Stat. 3, 16, 17, contains the following:

"... the Secretary of the Interior is authorized to make allotments under existing laws within the said Reservation to any Indians of said Blackfeet Tribe not heretofore allotted. ...

"Provided, further, that any and all minerals, including coal, oil and gas, are hereby reserved for the benefit of the Blackfeet Tribe of Indians until Congress shall otherwise direct, and patents hereafter issued shall contain a reservation accordingly; Provided, that the land containing such minerals may be leased under such rules and regulations and upon such terms and conditions as the Secretary of the Interior may prescribe."

The Act of September 20, 1922, c. 347, 42 Stat. 857, also provides:

"That lands reserved for school and agency purposes and all other unallotted lands on the Fort Peck and Blackfeet Reservations, in the State of Montana, reserved from allotment or other disposition, may be leased for mining purposes under regulations prescribed by the Secretary of the Interior."

It is to be observed that the administration of these special provisions and of the general provisions is committed to the supervision of the same officer—the Secretary of the Interior—and that in the exercise of this supervision he approved the present lease containing a recital that it was given in accordance with the general provisions. Not only so, but the agent in charge of the reservation recommended the lease, and the lessee accepted it, with that recital of its statutory foundation. In other words, all proceeded with the view that the general provisions are applicable, and not excluded by the special provisions.

We are of opinion that this view is right. The special provisions relate to the same subject that is dealt with in the general provisions and are to be read in the light of the latter. All were in force when the lease was given and all should be treated as one law so

far as this reasonably can be done.[2] The general provisions are more comprehensive than the special. The latter are meager and wanting in detail. The general provisions supply what is thus wanting. And, so far as is here material, there is no conflict, nor anything to prevent all from being carried into effect as if they were one law.

We conclude that the lease was given under the special provision in the Act of June 30, 1919, taken in connection with the general provisions. The Act of May 29, 1924, is one of the general provisions, and in it Congress assents to taxation by the State of the production of oil and gas through a lease given under its provisions.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] United States v. Freeman, 3 How. 556, 564; Converse v. United States, 21 How. 463, 467. And see United States v. Jefferson Electric Co., 291 U. S. 386, 396, and cases cited.